INDEX

Supreme Court of the United States

October Term, 1970

No. 600

ALCIDES PEREZ,

Petitioner,

—v.—

UNITED STATES,

Respondent.

Relevant Docket Entries in the Proceedings Below

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

October 23, 1968, before Rosling, J.—Indictment Ordered filed.

November 7, 1968, before Rayfiel, J.—Case called—Defendant and Counsel Mr. Schulman present. Defendant arraigned and enters a plea of not guilty. 30 days for motions. Bail continued and case placed on General Calendar.

November 7, 1968, Notice of Appearance filed.

February 3, 1969, before Mishler, J.—Case called—Marked ready.

February 18, 1969, before Mishler, J.—Case called. Defendant not present, counsel for the defendant present. Adjourned for trial on March 31, 1969.

March 5, 1969, Notice of Motion filed, returnable March 17, 1969, for Inspection, etc.

Relevant Docket Entries in the Proceedings Below

March 6, 1969, Affidavit of Gerard T. McGuire filed.

March 17, 1969, before Bartels, J.—Motion for Inspection, etc. Motion denied except what has been agreed by the Government.

March 26, 1969, Stenographer's transcript dated February 17, 1968 filed. (Pages 834-942).

March 28, 1969, Governments Trial Brief filed.

March 31, 1969, before Zavatt, Ch. J.—Case called. Defendant and counsel by L. Silbert present. Case marked ready for April 7, 1969. Bail continued.

April 7, 1969, Notice of Motion filed, returnable April 7, 1969, for an Order dismissing the indictment, etc.

April 7, 1969, Defendant's Memorandum of Law in support of motion to dismiss, etc. filed.

April 7, 1969, Government's supplemental memorandum filed.

April 7, 1969, before Rosling, J.—Motion for dismissal of the Indictment, etc. Case called. Motion argued and denied. (See order endorsed on back of motion papers.)

April 7, 1969, by Rosling, J.—Order filed denying motion.

April 7, 1969, before Rosling, J.—Case called. Defendant and counsel present. Trial ordered and begun. Jurors selected and sworn. Trial continued to April 8, 1969.

April 8, 1969, before Rosling, J.—Case called. Defendant and counsel Mr. Laifer present. Trial continued to April 9, 1969.

Relevant Docket Entries in the Proceedings Below

April 9, 1969, before Rosling, J.—Case called. Defendant and counsel Mr. Laifer present. Trial resumed. Motion to dismiss Counts 1 to 5 inclusive. Motion argued and denied. Motion for a redirected verdict in favor of the defendant. Motion denied. Trial continued to April 10, 1969.

April 10, 1969, before Rosling, J.—Case called. Defendant and counsel present. Trial resumed. Court grants defendant leave to reopen its motion to dismiss Count 5 and for a Judgment of Acquittal. Both motions are denied. Jury returns at 4:35 p.m. and finds the defendant guilty on Counts 1 to 5 inclusive. Sentence adjourned to May 16, 1969. Motion to set aside jury verdict denied. Defendant continued on bail in the sum of $10,000.00.

May 14, 1969, Stenographers transcript consisting of 4 volumes, pages 1-573, filed.

May 23, 1969, before Rosling, J.—Case called. Defendant and counsel present. Defendant is sentenced to be imprisoned for a period of 18 months on each of counts 1 to 5 inclusive. Sentences to run concurrently. Defendant to post a $10,000 Bond and a Notice of Appeal is to be filed forthwith. Execution of sentence is stayed pending appeal.

May 23, 1969, Judgment and Commitment filed. Certified copies to Marshal.

May 23, 1969—Notice of Appeal filed. (JN & USA).

May 23, 1969—Statement of Docket Entries and duplicate copy of Notice of Appeal mailed to the United States Court of Appeals for the Second Circuit.

Relevant Docket Entries in the Proceedings Below

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August 19, 1969—Order substituting counsel for appellant was filed.

May 1, 1970—Opinion and dissenting Opinion filed.

May 1, 1970—Judgment filed.

May 13, 1970—Motion to extend time to file petition for rehearing filed.

May 20, 1970—Motion to stay the issuance of mandate was filed.

May 20, 1970—Order granting motion to extend time to file petition for rehearing.

May 27, 1970—Order granting motion to stay the issuance of mandate, etc.

June 15, 1970—Petition for rehearing and rehearing in banc, etc.

July 1, 1970—Order denying petition for rehearing, etc.

July 1, 1970—Order denying petition for rehearing in banc.

Clerk's Certificate.

Indictment 68 Cr. 361 Filed in the United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—v—

ALCIDES PEREZ,

Defendant.

The Grand Jury Charges:

COUNT ONE

On or about July 8, 1968, within the Eastern District of New York, the defendant ALCIDES PEREZ, unlawfully, wilfully and knowingly used extortionate means, within the meaning of Section 891(7) of Title 18, United States Code, in collecting from Alexis Miranda, an extension of credit, to wit: the defendant ALCIDES PEREZ expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of the said Alexis Miranda.

(Title 18, United States Code, §§ 891, 894)

COUNT TWO

On or about July 13, 1968, within the Eastern District of New York, the defendant ALCIDES PEREZ, unlawfully wilfully and knowingly used extortionate means, within the meaning

of Section 891(7) of Title 18, United States Code, in collecting from Alexis Miranda, an extension of credit, to wit: the defendant ALCIDES PEREZ expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of the said Alexis Miranda.

(Title 18, United States Code, §§ 891, 894)

COUNT THREE

On or about July 20, 1968, within the Eastern District of New York, the defendant ALCIDES PEREZ, unlawfully, wilfully and knowingly used extortionate means, within the meaning of Section 891(7) of Title 18, United States Code, in collecting from Alexis Miranda, an extension of credit, to wit: the defendant ALCIDES PEREZ expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of the said Alexis Miranda.

(Title 18, United States Code, §§ 891, 894)

COUNT FOUR

On or about September 25, 1968, within the Eastern District of New York, the defendant ALCIDES PEREZ, unlawfully, wilfully and knowingly used extortionate means, within the meaning of Section 891(7) of Title 18, United States Code, in attempting to collect from Alexis Miranda, an extension of credit, to wit: the defendant ALCIDES PEREZ expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of the said Alexis Miranda.

(Title 18, United States Code, §§ 891, 894)

Indictment 68 Cr. 361 Filed in the United States District Court for the Eastern District of New York

COUNT FIVE

On or about October 2, 1968, within the Eastern District of New York, the defendant ALCIDES PEREZ, unlawfully, wilfully and knowingly used extortionate means, within the meaning of Section 891(7) of Title 18, United States Code, in attempting to collect from Alexis Miranda, an extension of credit, to wit: the defendant ALCIDES PEREZ expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of the said Alexis Miranda, his wife and his family.

(Title 18, United States Code, §§ 891, 894)

A TRUE BILL

/s/ IRVING B. GUEST
Foreman

/s/ JOSEPH P. HOEY
United States Attorney
By D. P. H.

Motion to Dismiss Indictment and Endorsement of the Court Denying Motion in the United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 CR 361

UNITED STATES OF AMERICA,

—against—

ALCIDES PEREZ,

Defendant.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Stephen R. Laifer, being duly sworn to the 4th day of April 1969, a motion will be made at a Part of the United States District Court for the Eastern District of New York, on the 7th day of April 1969, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order dismissing the indictment herein, on the ground that it is in violation of the Fifth, Sixth, Tenth and Fourteenth Amendments of the Constitution of the United States and for such other and further relief in the premises as this Court may seem just and proper.

Dated: April 4th, 1969.

Motion to Dismiss Indictment and Endorsement of the Court Denying Motion in the United States District Court for the Eastern District of New York

Yours, etc.,

SCHULMAN & LAIFER, ESQS.
Attorneys for Defendant
Office & P.O. Address
16 Court Street
Brooklyn, New York
UL 5-5840

To:

THE OFFICE OF THE U.S.
DISTRICT ATTORNEY
Criminal Division
U.S. District Attorney for the
Eastern District
225 East Cadman Plaza
Brooklyn, New York.

CLERK'S OFFICE
Criminal Division
225 East Cadman Plaza
Brooklyn, New York.

Affidavit of Stephen R. Laifer in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 CR 361

UNITED STATES OF AMERICA,

—against—

ALCIDES PEREZ,

Defendant.

STATE OF NEW YORK,
COUNTY OF KINGS } ss.:

STEPHEN R. LAIFER, being duly sworn, deposes and says:

That he is associated with Schulman & Laifer, attorneys for the defendant in the above proceedings and is submitting this affidavit in support of the motion to dismiss the indictment herein.

After a careful study of the facts, Statute and Laws involved in this indictment, he is firmly convinced that the Statute under which the defendant has been indicted is in violation of the Constitution of the United States and is submitting a memorandum of law simultaneously herewith.

WHEREFORE, it is respectfully requested that the indictment herein be dismissed.

(Sworn to before me this 4th day of April 1969.)

Endorsement on Motion

Motion Denied
So Ordered
4/7/69

George Rosling
U.S.D.J.

Filed
In Clerk's Office
U.S. District Court E.D.N.Y.
Apr 7 1969

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and seventy.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALCIDES PEREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be hard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Opinion and Dissenting Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 248—September Term, 1969.

(Argued December 1, 1969 Decided May 1, 1970.)

Docket No. 33767

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALCIDES PEREZ,

Appellant.

Before:

WATERMAN, HAYS and FEINBERG,

Circuit Judges.

Appeal from judgment of conviction after jury verdict, by United States District Court for the Eastern District of New York, George Rosling, *J.*, of use of extortionate means to collect extensions of credit. 18 U.S.C. §§ 891, 894, which prohibited the use of such means, was within Congressional power. Affirmed.

LEONARD H. SANDLER, New York, N. Y. (Albert J. Krieger, New York, N. Y., on the brief), *for appellant.*

Opinion and Dissenting Opinion of the United States Court of Appeals for the Second Circuit

ROGER A. PAULEY, Attorney, United States Department of Justice, Washington, D. C. (Edward R. Neaher, United States Attorney for the Eastern District of New York, Jerome M. Feit, Attorney, United States Department of Justice, Washington, D. C., on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

Alcides Perez appeals from a judgment of the United States District Court for the Eastern District of New York, George Rosling, *J.*, entered on a jury verdict convicting him of five counts of using extortionate means to collect or attempt to collect extensions of credit. 18 U.S.C. §§ 891, 894. Although appellant claims various errors in his trial, his major argument on appeal is that Congress did not have the power to pass the statute under which appellant was convicted, either under the Commerce Clause or the Bankruptcy Clause of the Constitution. We hold that the trial was proper and the evidence sufficient, and that Congress has the power to prohibit extortionate credit transactions.

The facts underlying appellant's conviction may be stated briefly. The victim of appellant's brutal collection methods was Alexis Miranda, a 26-year-old married butcher with three children, who was attempting to open his own butcher shop. Unable to obtain operating capital by a loan through such legitimate channels as the Chase Manhattan Bank and the Small Business Administration, Miranda made the mistake of borrowing some $3,000 from Perez. From the record, the rate of interest was somewhat vague

but is was obviously large enough to perpetuate the indebtedness forever. Miranda initially had to make repayments at a rate of $105 per week; Perez subsequently raised that to $130 a week, then to $205 and finally to $330. Miranda indicated that in all he paid some $6,500, but after many months of repayment he was still some $6,700 in debt. Miranda also testified that, when he had difficulty in paying these sums, Perez threatened him with hospitalization, harm to his family, the attention of persons higher in the moneylending chain, as well as an ominous "or else," if repayments should not be promptly forthcoming. Miranda hovered on the brink of insolvency, doubtless in large part because of the high payments to Perez, and was able to pay Perez only by obtaining meat on short-term credit, and then delaying his payments to suppliers. Finally driven to the wall, Miranda abandoned his business and fled to Puerto Rico, leaving his debts, legitimate and illegitimate, behind. On Miranda's return, appellant found him and again hounded him for further payment until appellant was arrested.

I.

Appellant's principal contention is that the statute under which he was convicted is unconstitutional in prohibiting all extortionate credit transactions, without requiring a showing in a particular case of effect on interstate commerce, or connection with the Bankruptcy Act. The statute was enacted as Title II of the Consumer Credit Protection Act of 1968 and amended Title 18 of the United States Code by adding Chapter 42, sections 891-96, which deal with "Extortionate Credit Transactions." According to the

legislative history, the statute was a far-reaching attempt to control "the vicious billion dollar a year loan-sharking racket," 114 Cong. Rec. 14384 (1968), and "a deliberate legislative attack on the economic foundations of organized crime." Conf. Rep. No. 1397, 90th Cong., 2d Sess. (1968), U.S. Code Cong. & Adm. News 2029. Section 891 defines "extortionate extension of credit" as one characterized by an understanding of both the creditor and debtor that delay in, or failure to make, repayment "could result in the use of violence or other criminal means to cause harm to the person. . . ." 18 U.S.C. §891. Section 892(a) provides the heavy penalty of imprisonment for not more than 20 years or a fine of not more than $10,000, or both, for any person making such an "extortionate extension of credit." Subsection (b) of the same section provides various indicia of whether an extension of credit is extortionate, including an excessive interest rate, the inability of the creditor to legally enforce the debt, and the reasonable belief of the debtor that the creditor has used extortionate means to collect debts in the past. Section 893 prohibits the "financing" of extortionate extensions of credit, an obvious attempt "to make possible the prosecution of the upper levels of the criminal hierarchy." Conf. Rep. No. 1397, *supra*, U.S. Code Cong. & Adm. News at 2027. Finally, section 894(a)—the section involved here—punishes the actual collection or attempt to collect any extension of credit by "extortionate means." Section 894(a)(1) places the same heavy penalties used in section 892 on anyone who

> (a) . . . knowingly participates in any way, or conspires to do so, in the use of any extortionate means

> (1) to collect or attempt to collect any extension of credit . . . .

"Extortionate means" is defined in section 891(7) as

> any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

It is clear from the above that the statute is a comprehensive federal attack on loan-sharking. Whatever may be the desirability of such national action, the question before us is whether Congress acted constitutionally.

II.

We turn now to a consideration of the power of Congress under the Commerce Clause of the Constitution, which in Article I, section 8 authorizes Congress to regulate "Commerce . . . among the several States." As we understand appellant's argument, he concedes that Congress would indeed have power to reach the activities of Perez if it were shown that some instrumentality of commerce were used either to effect the threats or to repay the loan, or that the loan itself was in, or affected, interstate commerce, or was connected in some specific way therewith. According to appellant, however, Congress cannot regulate (at least by simple criminal prohibition) a wholly intrastate individual transaction without some proof in the criminal prosecution that the transaction is thus connected with interstate commerce; since that was not done here, the conviction cannot stand. While appellant's position has force, we cannot agree that congressional power is so limited.

Opinion and Dissenting Opinion of the United States Court of Appeals for the Second Circuit

We will concede at the outset that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense. See, e.g., The Hobbs Act, 18 U.S.C. §1951 (obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion).[1] But this hardly resolves the question whether such a mode of drafting is *constitutionally* required. We assume that all would agree that the reach of federal power under the Commerce Clause is not now niggardly construed and that statutes relying upon that clause frequently apply to intrastate activity. This is made clear by the series of decisions described in *United States* v. *Darby*, 312 U.S. 100 (1941), and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and culminating in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 211 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); and *Maryland* v. *Wirtz*, 392 U.S. 192 (1968). In addition, these decisions support the proposition that individual proof of effect on interstate commerce is not required in each case, so long as Congress has made a rational overall determination.

In *United States* v. *Darby, supra*, 312 U.S. at 118, the formulation put forward by Justice Stone was whether the regulation of intrastate activity was an "appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."

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[1] See also 18 U.S.C. § 875 (transmitting kidnapping or extortion threats by means of interstate commerce); 18 U.S.C. § 2421 (transporting women in interstate commerce for prostitution, etc.).

This demands an evaluation, not of the effect of a particular item of intrastate activity on interstate commerce, but the effect of intrastate activity, as a whole, on interstate commerce. A similar approach was apparent in *Wickard* v. *Filburn, supra,* 317 U.S. at 127-28, where the Court said:

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

The point was made even clearer by the decisions in *Atlanta Motel, McClung* and *Maryland.* In the first, the Court considered the constitutionality of Title II of the Civil Rights Act of 1964. Section 201(c) thereof, 42 U.S.C. §2000a (c), conclusively declares, with exceptions not here important, that any motel "which provides lodging to transient guests" affects commerce *per se.* See *Atlanta Motel,* 379 U.S. at 247. To establish coverage under the Act in an individual case, there is no need to show that any particular guests are engaged in interstate travel; the congressional presumption of effect on interstate commerce is conclusive. In testing the constitutionality of the statute as applied to the Atlanta Motel, the Court did not look to proof of individual connection between the motel and interstate commerce. Instead it examined the basis of legislative action on the evidence available to Congress, pointing out, *id.* at 258:

> The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a

> basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

In *Katzenbach* v. *McClung, supra,* the Court again considered Title II of the Civil Rights Act, this time in its application to a restaurant as to which Congress did require, unlike motels, that a particular connection with interstate commerce be shown in the individual case; i.e., "a substantial portion of the food" served by the restaurant "has moved in commerce." However, appellants claimed that since the restaurant served only intrastate patrons, this was not enough to justify regulation under the Commerce Clause. As the Court put it, 379 U.S. at 303, appellants

> object to the omission of a provision for a case-by-case determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce.

The Court rejected this argument, 379 U.S. at 303-05:

> But Congress' action in framing this Act was not unprecedented. In *United States* v. *Darby,* 312 U.S. 100 (1941), this Court held constitutional the Fair Labor Standards Act of 1938. There Congress determined that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation. The appellees in that case argued, as do the appellees here, that the Act was invalid because it included no provision for an independent inquiry regarding the effect on commerce of substandard wages in a particular busi-

ness. (Brief for appellees, pp. 76-77, *United States* v. *Darby*, 312 U.S. 100.) But the Court rejected the argument, observing that:

> "[S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." At 120-121.

* * * * *

Confronted as we are with the facts laid before Congress, we must conclude that [Congress] had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. . . . Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, i.e., those, like the McClungs, serving food that has come from out of the State. We think in so doing that Congress *acted well within its power* to protect and foster commerce in extending the coverage to Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.

The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, *is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.* [Footnote omitted; emphasis added.]

Finally, in *Maryland* v. *Wirtz, supra,* the Court considered the constitutionality of an extension of the Fair Labor Standard Act to cover all employees of an "enterprise" engaged in commerce or production for commerce. The argument was made that if only a few employees of an "enterprise" are so engaged, labor conditions in such a business "may not affect commerce very much or very often." To this, the Court replied, 39 U.S. at 192-93:

> [W]hile Congress has in some instances left to the courts or to administrative agencies the task of determining whether commerce is affected in a particular instance, *Darby* itself recognized the power of Congress instead to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is "within reach of the federal power." The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. Wickard v. Filburn, 317 U.S. 111, 127-128; Polish Alliance v. Labor Bd., 322 U.S. 643, 648; Katzenbach v. McClung, [379 U.S. 294] 301 . . . . [Footnotes omitted.]

The Court went on to point out, 392 U.S. at 197 n. 27:

> Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

From these authorities, we conclude that whatever may have been the rule in earlier days, see generally, Schwartz, The Powers of Government, 178-237 (1963); Stern, The Scope of the Phrase *Interstate Commerce*, 41 A.B.A. J. 823 (1955), the present state of the law is that Congress can regulate intrastate transactions if a proper determination has been made that *as a class* such transactions affect or involve interstate commerce.[2] This conclusion is reinforced by the judicial treatment of the 1965 amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. §§331(q), 360a, which make it a crime under certain circumstances to manufacture, process, sell or possess any depressant or stimulant drug. Like the statute here under attack, these amendments do not require a showing in each case that interstate commerce has been affected. Nevertheless, several circuit courts to date have sustained convictions thereunder in the face of the argument that such an individual showing is constitutionally required. See *United States* v. *Cerrito*, 413 F.2d 1270 (7th Cir. 1969), cert. denied, —— U.S. —— (1970); *White* v. *United States*, 399 F.2d 813, 823 (8th Cir. 1968); *Deyo* v. *United States*, 396 F.2d 595 (9th Cir. 1968); *White* v. *United States*, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

The heart of appellant's argument in this case is that the Constitution requires that a determination be made in each prosecution under 18 U.S.C. §894 that interstate commerce is involved and that this determination must be made in a judicial proceeding. We believe that the decisions cited above at pp. 2660-2664 indicate that neither proposition

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[2] See also *United States* v. *Minor*, 396 U.S. 87, 98 n. 13 (1969).

stands up. So long as a class of intrastate transactions considered as a whole has a substantial effect on interstate commerce, Congress can regulate a particular intrastate transaction in the class even though in that instance the effect on interstate commerce is minimal or non-existent. If this is so, then proof in that individual case that there was some connection with, or effect on, interstate commerce should not have constitutional significance. That Congress may require such proof in a particular case—as it frequently does but did not here—is a matter of legislative policy or drafting technique. But it should not be controlling on the constitutional issue whether the particular intrastate activity may be federally regulated. The crucial question instead is whether there is a rational connection between the class of such intrastate activities, sensibly defined, and interstate commerce.

Appellant places his main reliance on *United States* v. *Fire Gambling Devices* (*United States* v. *Denmark*), 346 U.S. 441 (1953), which involved a statute, 15 U.S.C. §117, which required manufacturers and dealers in gambling devices to register and file periodic information. In that case, Mr. Justice Jackson, speaking for himself and two other justices stated that "penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce . . . raise[s] . . . a far-reaching question." *Id.* at 446-47. Mr. Justice Clark, dissenting for four members of the Court, 346 U.S. at 462-63, agreed that if Congress "had sought to *regulate* local activities, its power would no doubt be less clear," but nevertheless noted that:

> [T]he situation here is unique: the commodity involved is peculiarly tied to organized interstate crime and is itself illegal in the great majority of the states, and the federal law in issue was actively sought by local and state law enforcement officials as a means to assist them, not supplant them in local law enforcement.

With all respect, it seems to us that all that both the opinions of Justices Clark and Jackson can be read to stand for is that the question is a substantial one. See Schwartz, *op. cit. supra,* at 236-37. We agree with the Court of Appeals for the First Circuit that the Supreme Court in *Atlanta Motel* has since indicated "its willingness in a proper case to approve legislation declaring that certain activities affect interstate commerce per se without requiring proof in each case." See *White* v. *United States,* 395 F.2d 5, 8 n. 3 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

Therefore, it seems reasonably clear that Congress can regulate intrastate activity without any showing in a particular case that the activity affected interstate commerce, provided that a proper determination has been made that such intrastate activity, considered as a class, does have such effect and that the means selected to deal with it are reasonable and appropriate. To those questions, we now turn.

III.

As enacted, the statute here under attack contained the following Findings and Declaration of Purpose:[3]

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[3] Section 201 of Pub. L. 90-321, 82 Stat. 146, 159 (1968).

(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United

States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy.

Thus, Congress found that a typical extortionate credit transaction is either itself in interstate or foreign commerce or affects such commerce, or uses the means and instrumentalities thereof. There is no reason to doubt that these findings of legislative fact are true. There was considerable evidence at congressional hearings or otherwise available to Congress, as the Conference Report on this legislation noted,[4] that organized crime monopolizes loan-sharking in the metropolitan areas of the country, that money flows into loan-sharking from other illicit activities regardless of state lines, and that the profits flow back into the other activities of organized crime, including the take-over of legitimate business. See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, *passim*, particularly 2-3, 6-7, 11 (1967); Hearings on Impact of Crime on Small Business, S. Comm. on Small Business, 90th Cong., 2d Sess. (1968), particularly statements of Ralph Salerno and Henry Ruth, at 2-30. Moreover, the available evidence indicated that loan-sharking is so effective and lucrative because of high-level organization running across state lines, which eliminates competition between moneylenders in metropolitan areas and infuses threats of force with the respect which ordinarily only government can evoke. See *id.*

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[4] Conf. Rep. No. 1397, *supra*, U.S. Code Cong. & Adm. News, at 2026.

at 20-21; Schelling, Economic Analysis and Organized Crime, Task Force Report: Organized Crime, *supra*, 114-26. Loan-sharking activities can persuasively be characterized as generally in or affecting commerce precisely because such practices depend for their full effect on monopoly in metropolitan areas and national, or at least multistate, organization. This provided a logical basis for congressional focus on loan-sharking rather than on a variety of other crimes which may be far more "local" in nature, e.g., robbery, burglary, larceny. Task Force Report: Organized Crime, *supra*, 2-4. The legislative history also shows recognition by Congress that the states alone cannot control organized crime, including loan-sharking,[5] while federal efforts are better able to do so. See generally, Note, Loan-sharking: The Untouched Domain of Organized Crime, 5 Colum. J. of Law and Soc. Prob. 91, 93-110 (1969).

Accordingly, it would seem that the congressional finding that even "purely intrastate" extortionate credit transactions affect interstate commerce is a rational one and that the means chosen to deal with loan-sharking are appropriate. We note that the same conclusion has recently been reached by the Court of Appeals for the Seventh Circuit. *United States* v. *Biancofiori*, — F. 2d —, No. 17655 (Feb. 2, 1970); accord, *United States* v. *Curcio*, —— F. Supp. ——, Crim. No. 12,625 (D. Conn. Feb. 24, 1970). Appellant does not effectively challenge these overall con-

[5] See 114 Cong. Rec. 14490 (1968) (Remarks of Sen. Proxmire). See also Hearings on the Federal Effort Against Organized Crime Before a Subcommittee of the House Committee on Government Operations, 90th Cong., 1st Sess. Part I at 68-69 (1967).

gressional determinations, a burden he should have to assume but does not. Instead, he argues in general terms that 18 U.S.C. §§ 891, 894 go further than any earlier statute and conjures up hypothetical examples of money lending that would have no effect on interstate commerce. If by the first assertion appellant means that the reach of the statute is far broader than earlier regulation of intrastate commerce on the ground that it affects interstate commerce, the claim is not accurate. Nor should the fact that this is a criminal statute be controlling. Indeed, *United States* v. *Darby, supra,* was a criminal prosecution. What the argument is reduced to is that the failure to require proof in each case of effect on commerce is a fatal defect. For reasons already given, that contention is without merit. Equally unpersuasive is the conjuring up in appellant's brief of innocent lenders suddenly enmeshed in federal criminal law; e.g.,

> [I]f someone borrows money from a friend, fails to repay it, and the lender loses his temper and threatens violence, a federal crime has occurred. More broadly, if a loan is made to a housewife, a lawyer, a doctor, a retail worker, or anyone in a host of occupations, that would have no impact on interstate commerce, or the most tenuous impact, a threat of violence to recover the debt becomes a federal crime.[6]

The examples are strangely reminiscent of dissenting opinions in earlier vindications of federal power over interstate

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[6] Appellant's brief, p. 22.

commerce.[1] Apart from the dubious assumption that a loan from a "friend" would occasion a federal prosecution, Congress had the constitutional power to determine that the typical loan-sharking transaction has more than a "tenuous impact" on interstate commerce, and that it was necessary or appropriate to include all loan-sharking within the reach of the statute. Once Congress has made those determinations, we are bound by them unless they are irrational, even if the statutory language literally applies to a few atypical transactions not now before us. What is known as legislative fact for a class of transactions—the effect on interstate commerce—is not necessarily easily provable in an individual instance of loan-sharking. Trying to trace the flow of funds from the immediate enforcer to the organization behind the loan might well be impossible in a particular case. Money, of course, is a classic fungible commodity; showing its movement interstate may be completely impossible where all that moves is cash recorded, if at all, as an intangible on someone's records or in someone's memory. Cf. *White* v. *United States, supra*, 395 F.2d at 7. In short, while appellant's examples are not the kind of loans that occasioned the statute, the vague possibility that they may be technically covered by its language does not render the statute unconstitutional.

In conclusion: Congress has determined that all loan-sharking activities should be prohibited, that even those

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[1] See, e.g., the dissent in *NLRB* v. *Fainblatt*, 306 U.S. 601, 610 (1939):

> If the plant presently employed only one woman who stitched one skirt during each week which the owner regularly accepted and sent to another state, Congressional power would extend to the enterprise, according to the logic of the Court's opinion.

"purely intrastate in character . . . directly affect interstate and foreign commerce," and that the statute here involved is a necessary legislative response to eliminate an obvious evil. We do not feel justified in setting aside these determinations; we hold the statute constitutional.[8]

IV.

Finally, appellant contends that the jury verdict was not supported by credible evidence because of contradictions in the testimony of Miranda. The evidence showed that on five separate occasions Perez threatened Miranda with the use of violence unless Miranda made payments on various loans that Perez had arranged for him. Miranda's testimony was corroborated in part by his wife and by one of his employees. Any contradictions were for the jury to consider in assessing his credibility.

Appellant also argues that a statement by the prosecution on summation improperly buttressed Miranda's testimony. Even if the statement was erroneous, the issue is not available on appeal since no objection was made. See *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), cert denied, 383 U.S. 907 (1966).

Appellant's contention that he was prejudiced by the failure of the prosecution to accept a defense stipulation as to appellant's signature on a check is equally without merit.

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[8] It is therefore unnecessary to deal with the Government's alternate contention that the statute is an "appropriate" exercise of congressional power to preserve the effectiveness of the bankruptcy laws, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 409-20 (1819); see Conf. Rep., *supra*, U.S. Code Cong. & Adm. News, at 2025-26, although the Seventh Circuit has accepted this argument. *United States* v. *Biancofiori*, *supra*.

Opinion and Dissenting Opinion of the United States Court of Appeals for the Second Circuit

Judgment affirmed.

HAYS, *Circuit Judge* (dissenting):

In my opinion the conviction should be reversed because Congress exceeded its constitutional powers in enacting the statute on which the conviction was based.

I.

I do not believe that the power to extend federal criminal law to cover extortionate credit transactions can be found in the Bankruptcy Clause. The statute is clearly not a uniform law on the subject of bankruptcy. Congress has sought to justify the statute on the ground that, if extortionate means are used to collect an extension of credit, the debtor may be deprived of his right to a discharge in bankruptcy. But this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to us to be capable of such an all-inclusive construction. Making a federal crime of every threat to collect or attempt to collect an extension of credit is not reasonably related to assuring debtors of their right to discharge in bankruptcy. The relationship is so artificial and tenuous that the power to enact the statute cannot properly be rested on the Bankruptcy Clause.

II.

If the statute is valid it must be so because it is within the scope of congressional authority to regulate interstate commerce.

But the statute does not require the government to prove, as an element of the crime, that either the threat of violence or the credit extension at issue had any effect whatsoever upon or any relation to interstate commerce. Although the Congressional findings refer to organized crime there is no requirement in the statute that the prosecution establish any connection between organized crime and the transaction which is condemned. Every instance of the use of extortionate means to collect an extension of credit is made a federal crime without regard to the relationship of the parties or their identity. Nor is there any requirement that the debt involved in the prosecution be of any particular nature or that any minimum amount be involved. Every trivial, insignificant and purely local act of the kind condemned is made a federal crime without any requirement of showing any connection with or effect upon interstate commerce. It is quite clear that not every extortionate act, no matter how small the debt involved, has any significant effect on interstate commerce.

There is no reason to believe that using threats to collect debts has any more effect upon interstate commerce than any other crime involving property. If extortionate conduct unrelated to interstate commerce can be made a federal crime, so can such crimes as robbery, burglary and larceny.

The statute here questioned is unprecedented in making a federal crime of conduct related to interstate commerce only by an assumed effect on such commerce. In all previous federal criminal statutes proof of some specific connection with interstate commerce such as movement across state lines or the use of some instrumentality of interstate commerce, such as the mails, has been required.

There is no Supreme Court case which suggests that Congress can ignore the requirement that some connection with interstate commerce must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause. In *United States* v. *Denmark*, 346 U.S. 441 (1953), the constitutionality of Section 3 of the Johnson Act was in issue. That provision required "every manufacturer and dealer in gambling devices annually to register his business and name and monthly to file detailed information as to each device sold and delivered during the preceding month." *Id.* at 443. An opinion written by Mr. Justice Jackson and joined by two other justices construed the Act as not applying to "purely intrastate matters." *Id.* at 450. To hold otherwise they said would raise "a far-reaching question as to the extent of congressional power over matters internal to the individual states." *Id.* at 447.

Two justices, who concurred in the result, believed that the statute was too vague to be enforceable, but gave no sign of disagreement as to the constitutionality of its purported effect on intrastate transactions.

Four justices dissented stating their belief that the Act was intended to cover certain intrastate matters and that it was constitutional. However, they said at 462-63:

> "If Congress by §3 had sought to *regulate* local activity, its power would no doubt be less clear. But here there is no attempt to regulate; all that is required is information in aid of enforcement of the conceded power to ban interstate transportation. The distinction is substantial."

Thus a clear majority of the Court doubted the constitutionality of an attempt to "regulate" the intrastate activities of those engaged in commercial gambling. None of the justices upheld such power. In the statute now under consideration Congress has attempted to regulate the intrastate activities of those engaged in the crime of extortion.

In seeking to uphold congressional power to enact the statute, the majority relies principally on *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) and *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). Neither in these cases nor in any of the cases cited by the majority did Congress attempt as it has here to regulate intrastate crime. Moreover, in each of the three statutes involved in the cited cases Congress was careful to require a definite relationship with interstate commerce. In *Atlanta Motel*, the statute was made applicable only to motels which provide lodging to transient guests. In *McClung*, the restaurants were made subject to the statute only where a substantial portion of the food they served has "moved in commerce." In *Maryland* v. *Wirtz*, the employees covered by the statute were employees of enterprises engaged in commerce or in production of goods for commerce.

In the present case there is no requirement that the conduct sought to be regulated have any connection whatever with commerce. The mere use of the words "affects interstate commerce" cannot justify the abdication of judicial responsibility to interpret constitutional limitations on federal power. Here Congress has sought to use the Commerce Clause as a basis for criminal sanctions on purley local activity. I think that the prohibition of all extortionate credit transactions is not within the congressional power to regulate interstate commerce. I therefore respectfully dissent.

Order Denying Petition for Rehearing in the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALCIDES PEREZ,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that

1. The petition for rehearing is denied.

2. The mandate is stayed pending application for certiorari subject to Rule 41(b) of the Federal Rules of Appellate Procedure.

3. Appellant be allowed to continue on bail provided that a petition for certiorari is filed in accordance with said Rule 41(b).

STERRY R. WATERMAN
PAUL R. HAYS
WILFRED FEINBERG
Circuit Judges

July 1, 1970

Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

33767

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALCIDES PEREZ,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

July 1, 1970

Order of Supreme Court of the United States Granting Certiorari

SUPREME COURT OF THE UNITED STATES

No. 600, October Term, 1970

ALCIDES PERES,

Petitioner,

v.

UNITED STATES,

ORDER ALLOWING CERTIORARI. Filed November 16, 1970

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 600

ALCIDES PEREZ,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CASES CITED:

IN THE

Supreme Court of the United States

October Term, 1970

No.

ALCIDES PEREZ,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Alcides Perez, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him on May 1, 1970.

A. The Opinion Below

On May 1, 1970, the Petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B. Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Question Presented

Whether or not the statutory sections under which the Petitioner was convicted constituted an unconstitutional exercise of legislative power by the Congress.

D. Constitutional Provisions and Statutes

Title 18, United States Code, Section 891; Title 18, United States Code, Section 892; Title 18, United States Code, Section 893; Title 18, United States Code, Section 894; Title 18, United States Code, Section 895; Title 18, United States Code, Section 896; Title 28, United States Code, Section 1254(1).

Art. 1, Sec. 8, Cl. 3; Art. 1, Sect. 8, Cl. 4; Fifth Amendment; Tenth Amendment; Rule 19, Supreme Court Rules.

E. Statement of the Case

The Petitioner, Alcides Perez, was convicted in the United States District Court for the Eastern District of New York before the Honorable George Rosling and a jury on five counts of using extortionate means to collect or attempt to

collect extensions of credit in violation of Title 18, United States Code, Sections 891 and 894. The Petitioner was sentenced to eighteen months imprisonment on each count to run concurrently.

The Petitioner attacked the constitutionality of the statutes under which he was convicted by a motion to dismiss the indictment at his trial and in his appeal of the subsequent conviction to the United States Court of Appeals for the Second Circuit. The Court of Appeals while acknowledging the force of the Petitioner's position[1] nevertheless found Chapter 42 of Title 18, the Federal anti-loan sharking statute, constitutional, the Honorable Paul R. Hays, Circuit Judge, dissenting.

Title 18, United States Code, Chapter 42, Sections 891 through 896 deal with "extortionate credit transactions" and was enacted as Title II of the Consumer Credit Protection Act of 1968. The statute was a far reaching attempt to control "the vicious billion dollar a year loan sharking racket".[2] Section 891 defines "extortionate extension of credit" as one in which the understanding of both creditor and debtor is that failure to make timely repayment "could result in the use of violence or other criminal means to cause harm to the person . . ." Title 18, United States Code, Section 891.

Section 892(a) imposes the onerous penalty of imprisonment of not more than twenty years or a fine of not more than $10,000.00 or both for the making of an extortionate ex-

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[1] *United States* v. *Perez*, Slip Op. 2655 (2nd Cir. May 1, 1970), page 2659.

[2] 114 Cong. Rec. 14384 (1968).

tension of credit. Sub-section (b) of Section 892 sets forth various indicia that characterize extortionate credit extensions such as exessive interest rate, legal unenforceability of the obligation, and the reasonable belief of the creditor that he will come to harm if he fails to comply with the terms of his agreement.

Section 893 proscribes the "financing of extortionate credit transactions".

Finally, Section 894 (a) punishes the collection or attempt to collect credit extensions by "extortionate means". Section 894 (a) (1) provides the same penalty as enumerated in Section 892 (a), *supra*.

ARGUMENT

The Statutory Sections under which the Petitioner was convicted constitute an unconstitutional exercise of legislative power by the Congress.

The federal anti-loan sharking statute, Title 18, United States Code, Chapter 42, constitutes an extensive, pervasive and unrestricted regulation of intrastate crime. The statute fails to include as an element of the offense proscribed any federal connection, and further fails to make even the slightest attempt to delimit the conduct proscribed to the smallest possible class consistent with the avowed findings and purposes of the statute. Congress declared two alternative, constitutional bases for this unprecedented legislation: The Congressional power to establish uniform and effective laws on the subject of bankruptcy (Art. 1, Sect. 8, Cl. 4, United States Constitution), and the Congressional

power under the Commerce Clause (Art. 1, Sect. 8, Cl. 3, United States Constitution).

The Petitioner submits that the instant legislation goes so far beyond the Congressional prerogatives under either the bankruptcy or commerce clause that it obliterates the fundamental distinction underlying the Tenth Amendment to the United States Constitution.

A. Bankruptcy Clause

Article 1, Section 8, Clause 4 of the United States Constitution authorizes Congress to establish "uniform laws on the subject of bankruptcies throughout the United States. . . ." As explained in the conference report on this legislation, the purpose of the bankruptcy laws was to permit debtors to discharge certain obligations, and that purpose could not be achieved with regard to obligations concerning which extortionate means were to be employed.

We know of nothing remotely resembling this exercise of power under the bankruptcy clause prior to the sections in question. Our contention is simply this. Congress may well have power to prohibit extortionate means of recovering obligations as applied to individuals actually in bankruptcy. To undertake to impose criminal penalties with regard to loans to individuals not in bankruptcy and who do not go into bankruptcy on the possibility that they might go into bankruptcy, seems to us an extravagant interpretation of the bankruptcy power. If the bankruptcy section is found to sustain this kind of power, it is hard to visualize any kind of commercial transaction for which a rationale could not be found that would bring it within the Con-

gressional bankruptcy clause.[3] As Judge Hays observed,

> ". . . this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to us to be capable of such an all-inclusive construction. Making a federal crime of every threat to collect or attempt to collect an extension of credit is not reasonably related to assuring debtors of their right to discharge in bankruptcy. The relationship is so artificial and tenuous that the power to enact the statute cannot properly be rested on the Bankruptcy Clause." Opinion, Page 2673.

We submit that this basis for the statutory scheme involved is palpably invalid and unconstitutional.

B. The Commerce Clause

Despite the fact "that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense,"[4] the instant legislation proscribes all extortionate credit transactions whether or not, in an individual case, the transaction affects interstate commerce.

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[3] The Court of Appeals for the Second Circuit concluding that Chapter 42 was a constitutional exercise of legislative power under the Commerce Clause, did not reach the basis under the Bankruptcy Clause although the Court of Appeals for the Seventh Circuit has upheld the constitutionality of this statute under both the Bankruptcy and Commerce Clauses. *United States* v. *Biancofiori*, F. 2d February 2, 1970.

[4] Opinion, page 2659.

Rather than require that the Federal connection be proven in each prosecution beyond a reasonable doubt, Congress instead asserted its jurisdiction on the basis of certain "Findings and Delaration of Purpose."

"(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the

> provisions of chapter 42 of title 18 of the United States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy." Section 201 of Pub. L. 90-321, 82 Stat. 146, 159 (1968)

The substitution of Congressional Findings of its own jurisdiction for a judicial determination of that issue on a case by case basis raises complex, substantial and compelling questions.

First and most crucial, may Congress simply declare a broad area of criminal conduct subject to its regulatory powers under the Commerce Clause and then proceed to punish even wholly intrastate crime that happens to fall within that class.

Although this Court has upheld the power of Congress under the Commerce Clause to regulate in this way certain classes of conduct, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964), *Katzenbach* v. *McClung,* 379 U.S. 294 (1964) and *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), never has this Court upheld such regulation over so broad and unrestricted a class. The instant legislation punishes all loan-sharking no matter how small the amount of the transaction, what the relationship between the parties may have been, how many such transactions a given defendant may have been involved with, whether the creditor is an "independent operator" or in association with others. The unqualified, all-pervasive scope of conduct proscribed here stands in sharp contrast to previous legislation of this kind where Congress has required a definite and limiting relationship between the class of conduct proscribed and interstate commerce. In *Atlanta Motel, supra,* the statute was

applicable only to motels which provide lodging to transient guests; in *McClung, supra,* to restaurants that served food, a substantial portion of which had "moved in commerce"; and in *Maryland* v. *Wirtz, supra,* to employees of enterprises engaged in commerce or in the production of goods for commerce.

Certainly, if a fisherman is licensed to catch only big fish and claims that the only practical way he can catch them is to use a net, if he is to be allowed to use a net at all, he should be required to use one that will allow at least the small fish to swim through.

A second group of questions raised pointedly by this statute relate to the "Congressional Findings" themselves. "The mere use of the words 'affects interstate commerce' cannot justify the abdication of judicial responsibility to interpret constitutional limitations on federal power." Opnion, Judge Hays, page 2676. Apparently concurring in this view with Judge Hays, the majority below sought to determine

> "Whether there is a rational connection between the class of such intrastate activities, sensibly defined, and interstate commerce". Opinion, p. 2666

But, what are the requisites of a "rational connection"?

If Congress had taken an objective sample of state loan sharking prosecutions and determined as to each whether a federal element existed,[5] what percentage of the "federal" cases would be sufficient to support a finding of "rational

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[5] e.g., Whether the defendant was believed to be connected with organized crime, whether some interstate facility was used in connection with the transaction or whether the transaction had some other direct and discernible impact on interstate commerce.

connection?" This Court has defined the "rational connection" standard in a slightly different context. In holding the 21 U.S.C. 176(a) presumption of knowledge of illegal importation unconstitutional, the Court stated that

> "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." *Leary* v. *United States,* 395 U.S. 6 at 24.

The fact presumed in *Leary, supra,* knowledge of illegal importation, and the facts presumed in the instant statute, the Congressional Findings, must "more likely than not flow from the proved fact on which it is made to depend."

Applying these criteria to a sample of loan-sharking cases, it is clear that at least a majority of these would have to be found to contain a federal element in order to sustain a "rational connection" between loan-sharking, the fact proved, and an affect upon interstate commerce, the fact presumed. Furthermore, since in the instant statute the presumption is irrebutable and since the failure of this statute to make a federal connection an element of the crime is justified by the assertion that almost all instances of loan-sharking affect interstate commerce, the degree of probability required to support a "rational connection" should be greater than that required in *Leary, supra.*

But, the Congressional Findings, no matter how heavily they are weighed, cannot survive even the minimal requisites of *Leary.* Congress made no statistical analysis of the legion

of state loan-sharking prosecutions; in point of fact, Congress failed even to hold hearings. The real basis of the "findings" is the claimed relationship between 'organized crime' and loan sharking. If in fact such an entity as organized crime exists the present lack of real information as opposed to mere speculation precludes even the possibility of making reasonably sound findings of fact relating to it. If the bulk of the supposed members of organized crime cannot be identified nor the extent of its organization or operations clearly defined, the Congressional Finding that the proceeds of loan-sharking constitute a substantial portion of the income of organized crime must surely be suspect.

Finally, the totally pervasive and unrestricted Federal regulation of purely local criminal conduct is especially repugnant. In the single instance where this Court considered the kind of regulation of intrastate crime embodied in Chapter 42, *United States* v. *Denmark*, 346 U.S. 441, a majority of the Court doubted the constitutionality of an attempt to regulate the intrastate activity of those engaged in commercial gambling, while none of the justices upheld such a power.

Laws that proscribe criminal conduct reflect, both in terms of the activity proscribed and the sanction imposed, the attitude and views of the societal or governmental unit which makes the laws. As a result, a class of conduct which is proscribed in one state may not be proscribed in another; the penalty for the commission of a crime in one state may be vastly different in degree from that imposed in another. The benefit that results from this kind of cultural relativism is that a criminal defendant having been conditioned by the ethics and mores of a geographical area will be governed by a set of procedures and penalties that reflect the very same mores and ethics that conditioned his unlawful act. When a

young child smears paint on the walls of his home, he is subject to and can rightfully expect responses from his parents based upon the attitudes and value structures which they have instilled in him. Yet when the young child smears paint on the walls of his neighbor's house he will expect a different set of responses and in a very real sense, he is committing a different act. When a defendant has committed an act punishable by the laws of the State of New York, he subjects himself to the procedures and penalties of the State of New York; but when a defendant has committed an act which intrudes upon interstate commerce, he makes himself subject to a different set of procedures and sanctions, and properly so, and he invests in the United States a legitimate interest in deterring such conduct.

Chapter 42 does not limit the scope of its application to conduct which does in fact affect interstate commerce. Not only does this Chapter fail to exclude from its sanctions acts completely intrastate, it totally precludes, by operation of the Congressional Findings and Declaration of Purpose, any possibility of such exclusion. The terrible result is that this Chapter proscribes and punishes conduct which it was never intended to affect.

If this kind of legislation can be countenanced in other areas, it cannot be tolerated when one who may be innocent of any violation of a *Federal* interest is swept up indiscriminately by this statutory dragnet and made subject to a possible incarceration of twenty years.

The effect of Chapter 42 is the proscription of a class of conduct, some of which conduct Congress is empowered to proscribe and some of which Congress is not empowered to proscribe. When the procedures by which the guilt or

innocence of a criminal defendant are to be affected and the jeopardy that attaches once the determination of guilt is made is fixed as a result of a finding that interstate commerce is affected, due process requires that such a finding be proven in each and every case beyond a reasonable doubt.

In conclusion, we submit that the urgent need for resolution of the issues made in this Petition goes even beyond the horrific consequences of unlawful incarceration. If Congress can punish under the Commerce Clause local loansharking solely on the basis of its own unreviewed, irrebutable findings, it can punish any crime relating in any way to money or property committed anywhere in this country. The implications of this statute are awesome and the substantial question of its constitutionality should therefore be speedily resolved.

CONCLUSION

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
Alcides Peres

IVAN S. FISHER,
Of Counsel

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 248—September Term, 1969.

(Argued December 1, 1969 Decided May 1, 1970.)

Docket No. 33767

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALCIDES PEREZ,

Appellant.

Before:

WATERMAN, HAYS and FEINBERG,

Circuit Judges.

Appeal from judgment of conviction after jury verdict, by United States District Court for the Eastern District of New York, George Rosling, *J.*, of use of extortionate means to collect extensions of credit. 18 U.S.C. §§891, 894, which prohibited the use of such means, was within Congressional power. Affirmed.

LEONARD H. SANDLER, New York, N. Y. (Albert J. Krieger, New York, N. Y., on the brief), *for Appellant.*

ROGER A. PAULEY, Attorney, United States Department of Justice, Washington, D. C. (Edward R. Neaher, United States Attor-

ney for the Eastern District of New York, Jerome M. Feit, Attorney, United States Department of Justice, Washington, D. C., on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

Alcides Perez appeals from a judgment of the United States District Court for the Eastern District of New York, George Rosling, *J.*, entered on a jury verdict convicting him of five counts of using extortionate means to collect or attempt to collect extensions of credit. 18 U.S.C. §§891, 894. Although appellant claims various errors in his trial, his major argument on appeal is that Congress did not have the power to pass the statute under which appellant was convicted, either under the Commerce Clause or the Bankruptcy Clause of the Constitution. We hold that the trial was proper and the evidence sufficient, and that Congress has the power to prohibit extortionate credit transactions.

The facts underlying appellant's conviction may be stated briefly. The victim of appellant's brutal collection methods was Alexis Miranda, a 26-year-old married butcher with three children, who was attempting to open his own butcher shop. Unable to obtain operating capital by a loan through such legitimate channels as the Chase Manhattan Bank and the Small Business Administration, Miranda made the mistake of borrowing some $3,000 from Perez. From the record, the rate of interest was somewhat vague but it was obviously large enough to perpetuate the indebtedness forever. Miranda initially had to make repayments at a rate of $105 per week; Perez subsequently raised

that to $130 a week, then to $205 and finally to $330. Miranda indicated that in all he paid some $6,500, but after many months of repayment he was still some $6,700 in debt. Miranda also testified that, when he had difficulty in paying these sums, Perez threatened him with hospitalization, harm to his family, the attention of persons higher in the moneylending chain, as well as an ominous "or else," if repayments should not be promptly forthcoming. Miranda hovered on the brink of insolvency, doubtless in large part because of the high payments to Perez, and was able to pay Perez only by obtaining meat on short-term credit, and then delaying his payments to suppliers. Finally driven to the wall, Miranda abandoned his business and fled to Puerto Rico, leaving his debts, legitimate and illegitimate, behind. On Miranda's return, appellant found him and again hounded him for further payment until appellant was arrested.

I.

Appellant's principal contention is that the statute under which he was convicted is unconstitutional in prohibiting all extortionate credit transactions, without requiring a showing in a particular case of effect on interstate commerce, or connection with the Bankruptcy Act. The statute was enacted as Title II of the Consumer Credit Protection Act of 1968 and amended Title 18 of the United States Code by adding Chapter 42, sections 891-96, which deal with "Extortionate Credit Transactions." According to the legislative history, the statute was a far-reaching attempt to control "the vicious billion dollar a year loan-sharking

racket," 114 Cong. Rec. 14384 (1968), and "a deliberate legislative attack on the economic foundations of organized crime." Conf. Rep. No. 1397, 90th Cong., 2d Sess. (1968), U.S. Code Cong. & Adm. News 2029. Section 891 defines "extortionate extension of credit" as one characterized by an understanding of both the creditor and debtor that delay in, or failure to make, repayment "could result in the use of violence or other criminal means to cause harm to the person . . . ." 18 U.S.C. §891. Section 892(a) provides the heavy penalty of imprisonment for not more than 20 years or a fine of not more than $10,000, or both, for any person making such an "extortionate extension of credit." Subsection (b) of the same section provides various indicia of whether an extension of credit is extortionate, including an excessive interest rate, the inability of the creditor to legally enforce the debt, and the reasonable belief of the debtor that the creditor has used extortionate means to collect debts in the past. Section 893 prohibits the "financing" of extortionate extensions of credit, an obvious attempt "to make possible the prosecution of the upper levels of the criminal hierarchy." Conf. Rep. No. 1397, *supra*, U.S. Code Cong. & Adm. News at 2027. Finally, section 894(a)—the section involved here—punishes the actual collection or attempt to collect any extension of credit by "extortionate means." Section 894(a) (1) places the same heavy penalties used in section 892 on anyone who

> (a) . . . knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit . . . .

"Extortionate means" is defined in section 891(7) as

> any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

It is clear from the above that the statute is a comprehensive federal attack on loan-sharking. Whatever may be the desirability of such national action, the question before us is whether Congress acted constitutionally.

II.

We turn now to a consideration of the power of Congress under the Commerce Clause of the Constitution, which in Article I, section 8 authorizes Congress to regulate "Commerce . . . among the several States." As we understand appellant's argument, he concedes that Congress would indeed have power to reach the activities of Perez if it were shown that some instrumentality of commerce were used either to effect the threats or to repay the loan, or that the loan itself was in, or affected, interstate commerce, or was connected in some specific way therewith. According to appellant, however, Congress cannot regulate (at least by simple criminal prohibition) a wholly intrastate individual transaction without some proof in the criminal prosecution that the transaction is thus connected with interstate commerce; since that was not done here, the conviction cannot stand. While appellant's position has force, we cannot agree that congressional power is so limited.

We will concede at the outset that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense. See, e.g., The Hobbs Act, 18 U.S.C. §1951 (obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion).[1] But this hardly resolves the question whether such a mode of drafting is *constitutionally* required. We assume that all would agree that the reach of federal power under the Commerce Clause is not now niggardly construed and that statutes relying upon that clause frequently apply to intrastate activity. This is made clear by the series of decisions described in *United States* v. *Darby*, 312 U.S. 100 (1941), and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and culminating in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 211 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); and *Maryland* v. *Wirtz*, 392 U.S. 192 (1968). In addition, these decisions support the proposition that individual proof of effect on interstate commerce is not required in each case, so long as Congress has made a rational overall determination.

In *United States* v. *Darby, supra*, 312 U.S. at 118, the formulation put forward by Justice Stone was whether the regulation of intrastate activity was an "appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate

[1] See also 18 U.S.C. §875 (transmitting kidnapping or extortion threats by means of interstate commerce); 18 U.S.C. §2421 (transporting women in interstate commerce for prostitution, etc.).

commerce." This demands an evaluation, not of the effect of a particular item of intrastate activity on interstate commerce, but the effect of intrastate activity, as a whole, on interstate commerce. A similar approach was apparent in *Wickard* v. *Filburn, supra,* 317 U.S. at 127-28, where the Court said:

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

The point was made even clearer by the decisions in *Atlanta Motel, McClung* and *Maryland.* In the first, the Court considered the constitutionality of Title II of the Civil Rights Act of 1964. Section 201(c) thereof, 42 U.S.C. §2000a(c), conclusively declares, with exceptions not here important, that any motel "which provides lodging to transient guests" affects commerce *per se.* See *Atlanta Motel,* 379 U.S. at 247. To establish coverage under the Act in an individual case, there is no need to show that any particular guests are engaged in interstate travel; the congressional presumption of effect on interstate commerce is conclusive. In testing the constitutionality of the statute as applied to the Atlanta Motel, the Court did not look to proof of individual connection between the motel and interstate commerce. Instead it examined the basis of legislative action on the evidence available to Congress, pointing out, *id.* at 258:

> The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by

> motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

In *Katzenbach* v. *McClung, supra,* the Court again considered Title II of the Civil Rights Act, this time in its application to a restaurant as to which Congress did require, unlike motels, that a particular connection with interstate commerce be shown in the individual case; i.e., "a substantial portion of the food" served by the restaurant "has moved in commerce." However, appellants claimed that since the restaurant served only intrastate patrons, this was not enough to justify regulation under the Commerce Clause. As the Court put it, 379 U.S. at 303, appellants

> object to the omission of a provision for a case-by-case determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce.

The Court rejected this argument, 379 U.S. at 303-05:

> But Congress' action in framing this Act was not unprecedented. In *United States* v. *Darby,* 312 U.S. 100 (1941), this Court held constitutional the Fair Labor Standards Act of 1938. There Congress determined that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation. The appellees in that case argued, as do the appellees here, that the Act was invalid because it included no provision for an independent inquiry regarding the effect on commerce of substandard wages in a particular business. (Brief for appellees, pp. 76-77, *United States* v.

Darby, 312 U.S. 100.) But the Court rejected the argument, observing that:

> "[S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." At 120-121.
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> • • • • •
>
> Confronted as we are with the facts laid before Congress, we must conclude that [Congress] had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. . . . Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, i.e., those, like the McClungs, serving food that has come from out of the State. We think in so doing that Congress *acted well within its power* to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.
>
> *The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food*, a factor on which the appellees place much reliance, *is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.* [Footnote omitted; emphasis added.]

Finally, in *Maryland* v. *Wirtz, supra*, the Court considered the constitutionality of an extension of the Fair Labor Standards Act to cover all employees of an "enter-

prise" engaged in commerce or production for commerce. The argument was made that if only a few employees of an "enterprise" are so engaged, labor conditions in such a business "may not affect commerce very much or very often." To this, the Court replied, 392 U.S. at 192-93:

> [W]hile Congress has in some instances left to the courts or to administrative agencies the task of determining whether commerce is affected in a particular instance, *Darby* itself recognized the power of Congress instead to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is "within reach of the federal power." The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. Wickard v. Filburn, 317 U.S. 111, 127-128; Polish Alliance v. Labor Bd., 322 U.S. 643, 648; Katzenbach v. McClung, [379 U.S. 294] 301 .... [Footnotes omitted.]

The Court went on to point out, 392 U.S. at 197 n. 27:

> Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

From these authorities, we conclude that whatever may have been the rule in earlier days, see generally, Schwartz, The Powers of Government, 178-237 (1963); Stern, The Scope of the Phrase *Interstate Commerce*, 41 A.B.A. J.

823 (1955), the present state of the law is that Congress can regulate intrastate transactions if a proper determination has been made that *as a class* such transactions affect or involve interstate commerce.[2] This conclusion is reinforced by the judicial treatment of the 1965 amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. §§331(q), 360a, which make it a crime under certain circumstances to manufacture, process, sell or possess any depressant or stimulant drug. Like the statute here under attack, these amendments do not require a showing in each case that interstate commerce has been affected. Nevertheless, several circuit courts to date have sustained convictions thereunder in the face of the argument that such an individual showing is constitutionally required. See *United States* v. *Cerrito,* 413 F.2d 1270 (7th Cir. 1969), cert. denied, —— U.S. —— (1970); *White* v. *United States,* 399 F.2d 813, 823 (8th Cir. 1968); *Deyo* v. *United States,* 396 F.2d 595 (9th Cir. 1968); *White* v. *United States,* 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

The heart of appellant's argument in this case is that the Constitution requires that a determination be made in each prosecution under 18 U.S.C. §894 that interstate commerce is involved and that this determination must be made in a judicial proceeding. We believe that the decisions cited above at pp. 2660-2664 indicate that neither proposition stands up. So long as a class of intrastate transactions considered as a whole has a substantial effect on interstate commerce, Congress can regulate a particular intrastate transaction in the class even though in that

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[2] See also *United States* v. *Minor,* 396 U.S. 87, 98 n. 13 (1969).

instance the effect on intersatte commerce is minimal or non-existent. If this is so, then proof in that individual case that there was some connection with, or effect on, interstate commerce should not have constitutional significance. That Congress may require such proof in a particular case—as it frequently does but did not here—is a matter of legislative policy or drafting technique. But it should not be controlling on the constitutional issue whether the particular intrastate activity may be federally regulated. The crucial question instead is whether there is a rational connection between the class of such intrastate activities, sensibly defined, and interstate commerce.

Appellant places his main reliance on *United States* v. *Five Gambling Devices* (*United States* v. *Denmark*), 346 U.S. 441 (1953), which involved a statute, 15 U.S.C. §117, which required manufacturers and dealers in gambling devices to register and file periodic information. In that case, Mr. Justice Jackson, speaking for himself and two other justices stated that "penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce . . . raise[s] . . . a far-reaching question." *Id.* at 446-47. Mr. Justice Clark, dissenting for four members of the Court, 346 U.S. at 462-63, agreed that if Congress "had sought to *regulate* local activities, its power would no doubt be less clear," but nevertheless noted that:

> [T]he situation here is unique: the commodity involved is peculiarly tied to organized interstate crime and is itself illegal in the great majority of the states, and the federal law in issue was actively sought by local and state law enforcement officials as a means

> to assist them, not supplant them in local law enforcement.

With all respect, it seems to us that all that both the opinions of Justices Clark and Jackson can be read to stand for is that the question is a substantial one. See Schwartz, *op. cit. supra,* at 236-37. We agree with the Court of Appeals for the First Circuit that the Supreme Court in *Atlanta Motel* has since indicated "its willingness in a proper case to approve legislation declaring that certain activities affect interstate commerce per se without requiring proof in each case." See *White* v. *United States,* 395 F.2d 5, 8 n. 3 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

Therefore, it seems reasonably clear that Congress can regulate intrastate activity without any showing in a particular case that the activity affected interstate commerce, provided that a proper determination has been made that such intrastate activity, considered as a class, does have such effect and that the means selected to deal with it are reasonable and appropriate. To those questions, we now turn.

III.

As enacted, the statute here under attack contained the following Findings and Declaration of Purpose:[3]

> (a) The Congress makes the following findings:
>
> (1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and

[3] Section 201 of Pub. L. 90-321, 82 Stat. 146, 159 (1968).

property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankrupties.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of titl e18 of the United States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy.

Thus, Congress found that a typical extortionate credit transaction is either itself in interstate or foreign com-

merce or affects such commerce, or uses the means and instrumentalities thereof. There is no reason to doubt that these findings of legislative fact are true. There was considerable evidence at congressional hearings or otherwise available to Congress, as the Conference Report on this legislation noted,[4] that organized crime monopolizes loan-sharking in the metropolitan areas of the country, that money flows into loan-sharking from other illicit activities regardless of state lines, and that the profits flow back into the other activities of organized crime, including the take-over of legitimate business. See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, *passim*, particularly 2-3, 6-7, 11 (1967); Hearings on Impact of Crime on Small Business, S. Comm. on Small Business, 90th Cong., 2d Sess. (1968), particularly statements of Ralph Salerno and Henry Ruth, at 2-30. Moreover, the available evidence indicated that loan-sharking is so effective and lucrative because of high-level organization running across state lines, which eliminates competition between moneylenders in metropolitan areas and infuses threats of force with the respect which ordinarily only government can evoke. See *id.* at 20-21; Schelling, Economic Analysis and Organized Crime, Task Force Report: Organized Crime, *supra*, 114-26. Loan-sharking activities can persuasively be characterized as generally in or affecting commerce precisely because such practices depend for their full effect on monopoly in metropolitan areas and national, or at least multi-state, organization. This provided a logical basis for

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[4] Conf. Rep. No. 1397, *supra*, U.S. Code Cong. & Adm. News, at 2026.

congressional focus on loan-sharking rather than on a variety of other crimes which may be far more "local" in nature, e.g., robbery, burglary, larceny. Task Force Report: Organized Crime, *supra*, 2-4. The legislative history also shows recognition by Congress that the states alone cannot control organized crime, including loan-sharking,[5] while federal efforts are better able to do so. See generally, Note, Loan-sharking: The Untouched Domain of Organized Crime, 5 Colum. J. of Law and Soc. Prob. 91, 93-110 (1969).

Accordingly, it would seem that the congressional finding that even "purely intrastate" extortionate credit transactions affect interstate commerce is a rational one and that the means chosen to deal with loan-sharking are appropriate. We note that the same conclusion has recently been reached by the Court of Appeals for the Seventh Circuit. *United States* v. *Biancofiori*, F.2d , No. 17655 (Feb. 2, 1970); accord, *United States* v. *Curcio*, F. Supp. , Crim. No. 12,625 (D. Conn. Feb. 24, 1970). Appellant does not effectively challenge these overall congressional determinations, a burden he should have to assume but does not. Instead, he argues in general terms that 18 U.S.C. §§891, 894 go further than any earlier statute and conjures up hypothetical examples of money lending that would have no effect on interstate commerce. If by the first assertion appellant means that the reach of the statute is far broader than earlier regulation of intra-

[5] See 114 Cong. Rec. 14490 (1968) (Remarks of Sen. Proxmire). See also Hearings on the Federal Effort Against Organized Crime Before a Subcommittee of the House Committee on Government Operations, 90th Cong., 1st Sess. Part I at 68-69 (1967).

state commerce on the ground that it affects interstate commerce, the claim is not accurate. Nor should the fact that this is a criminal statute be controlling. Indeed, *United States* v. *Darby, supra,* was a criminal prosecution. What the argument is reduced to is that the failure to require proof in each case of effect on commerce is a fatal defect. For reasons already given, that contention is without merit. Equally unpersuasive is the conjuring up in appellant's brief of innocent lenders suddenly enmeshed in federal criminal law; e.g.,

> [I]f someone borrows money from a friend, fails to repay it, and the lender loses his temper and threatens violence, a federal crime has occurred. More broadly, if a loan is made to a housewife, a lawyer, a doctor, a retail worker, or anyone in a host of occupations, that would have no impact on interstate commerce, or the most tenuous impact, a threat of violence to recover the debt becomes a federal crime.[6]

The examples are strangely reminiscent of dissenting opinions in earlier vindications of federal power over interstate commerce.[7] Apart from the dubious assumption that a loan from a "friend" would occasion a federal prosecution, Congress had the constitutional power to determine that the typical loan-sharking transaction has more than a "tenuous impact" on interstate commerce, and that it was necessary

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[6] Appellant's brief, p. 22.

[7] See, e.g., the dissent in *NLRB* v. *Fainblatt,* 306 U.S. 601, 610 (1939):

> If the plant presently employed only one woman who stitched one skirt during each week which the owner regularly accepted and sent to another state, Congressional power would extend to the enterprise, according to the logic of the Court's opinion.

or appropriate to include all loan-sharking within the reach of the statute. Once Congress has made those determinations, we are bound by them unless they are irrational, even if the statutory language literally applies to a few atypical transactions not now before us. What is known as legislative fact for a class of transactions—the effect on interstate commerce—is not necessarily easily provable in an individual instance of loan-sharking. Trying to trace the flow of funds from the immediate enforcer to the organization behind the loan might well be impossible in a particular case. Money, of course, is a classic fungible commodity; showing its movement interstate may be completely impossible where all that moves is cash recorded, if at all, as an intangible on someone's records or in someone's memory. Cf. *White* v. *United States, supra*, 395 F.2d at 7. In short, while appellant's examples are not the kind of loans that occasioned the statute, the vague possibility that they may be technically covered by its language does not render the statute unconstitutional.

In conclusion: Congress has determined that all loan-sharking activities should be prohibited, that even those "purely intrastate in character . . . directly affect interstate and foreign commerce," and that the statute here involved is a necessary legislative response to eliminate an obvious evil. We do not feel justified in setting aside these determinations; we hold the statute constitutional.[8]

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[8] It is therefore unnecessary to deal with the Government's alternate contention that the statute is an "appropriate" exercise of congressional power to preserve the effectiveness of the bankruptcy laws, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 409-20 (1819); see Conf. Rep., *supra*, U.S. Code Cong. & Adm. News, at 2025-26, although the Seventh Circuit has accepted this argument. *United States* v. *Biancofiori, supra*.

IV.

Finally, appellant contends that the jury verdict was not supported by credible evidence because of contradictions in the testimony of Miranda. The evidence showed that on five separate occasions Perez threatened Miranda with the use of violence unless Miranda made payments on various loans that Perez had arranged for him. Miranda's testimony was corroborated in part by his wife and by one of his employees. Any contradictions were for the jury to consider in assessing his credibility.

Appellant also argues that a statement by the prosecution on summation improperly buttressed Miranda's testimony. Even if the statement was erroneous, the issue is not available on appeal since no objection was made. See *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), cert denied, 383 U.S. 907 (1966).

Appellant's contention that he was prejudiced by the failure of the prosecution to accept a defense stipulation as to appellant's signature on a check is equally without merit.

Judgment affirmed.

HAYS, *Circuit Judge* (dissenting):

In my opinion the conviction should be reversed because Congress exceeded its constitutional powers in enacting the statute on which the conviction was based.

I.

I do not believe that the power to extend federal criminal law to cover extortionate credit transactions can be found in the Bankruptcy Clause. The statute is clearly not a uniform law on the subject of bankruptcy. Congress has sought to justify the statute on the ground that, if extortionate means are used to collect an extension of credit, the debtor may be deprived of his right to a discharge in bankruptcy. But this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to us to be capable of such an all-inclusive construction. Making a federal crime of every threat to collect or attempt to collect an extension of credit is not reasonably related to assuring debtors of their right to discharge in bankruptcy. The relationship is so artificial and tenuous that the power to enact the statute cannot properly be rested on the Bankruptcy Clause.

If the statute is valid it must be so because it is within the scope of congressional authority to regulate interstate commerce.

But the statute does not require the government to prove, as an element of the crime, that either the threat of violence or the credit extension at issue had any effect whatsoever upon or any relation to interstate commerce. Although the Congressional findings refer to organized crime there is no requirement in the statute that the prosecution establish any connection between organized crime and the

transaction which is condemned. Every instance of the use of extortionate means to collect an extension of credit is made a federal crime without regard to the relationship of the parties or their identity. Nor is there any requirement that the debt involved in the prosecution be of any particular nature or that any minimum amount be involved. Every trivial, insignificant and purely local act of the kind condemned is made a federal crime without any requirement of showing any connection with or effect upon interstate commerce. It is quite clear that not every extortionate act, no matter how small the debt involved, has any significant effect on interstate commerce.

There is no reason to believe that using threats to collect debts has any more effect upon interstate commerce than any other crime involving property. If extortionate conduct unrelated to interstate commerce can be made a federal crime, so can such crimes as robbery, burglary and larceny.

The statute here questioned is unprecedented in making a federal crime of conduct related to interstate commerce only by an assumed effect on such commerce. In all previous federal criminal statutes proof of some specific connection with interstate commerce such as movement across state lines or the use of some instrumentality of interstate commerce, such as the mails, has been required.

There is no Supreme Court case which suggests that Congress can ignore the requirement that some connection with interstate commerce must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause. In *United States* v. *Denmarkr*, 346 U.S. 441 (1953),

the constitutionality of Section 3 of the Johnson Act was in issue. That provision required "every manufacturer and dealer in gambling devices annually to register his business and name and monthly to file detailed information as to each device sold and delivered during the preceding month." *Id.* at 443. An opinion written by Mr. Justice Jackson and joined by two other justices construed the Act as not applying to "purely intrastate matters." *Id.* at 450. To hold otherwise they said would raise "a far-reaching question as to the extent of congressional power over matters internal to the individual states." *Id.* at 447.

Two justices, who concurred in the result, believed that the statute was too vague to be enforceable, but gave no sign of disagreement as to the constitutionality of its purported effect on intrastate transactions.

Four justices dissented stating their belief that the Act was intended to cover certain intrastate matters and that it was constitutional. However, they said at 462-63:

> "If Congress by §3 had sought to *regulate* local activity, its power would no doubt be less clear. But here there is no attempt to regulate; all that is required is information in aid of enforcement of the conceded power to ban interstate transportation. The distinction is substantial."

Thus a clear majority of the Court doubted the constitutionality of an attempt to "regulate" the intrastate activities of those engaged in commercial gambling. None of the justices upheld such power. In the statute now under consideration Congress has attempted to regulate the intrastate activities of those engaged in the crime of extortion.

In seeking to uphold congressional power to enact the

statute, the majority relies principally on *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) and *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). Neither in these cases nor in any of the cases cited by the majority did Congress attempt as it has here to regulate intrastate crime. Moreover, in each of the three statutes involved in the cited cases Congress was careful to require a definite relationship with interstate commerce. In *Atlanta Motel*, the statute was made applicable only to motels which provide lodging to transient guests. In *McClung*, the restaurants were made subject to the statute only where a substantial portion of the food they served has "moved in commerce." In *Maryland* v. *Wirtz*, the employees covered by the statute were employees of enterprises engaged in commerce or in production of goods for commerce.

In the present case there is no requirement that the conduct sought to be regulated have any connection whatever with commerce. The mere use of the words "affects international commerce" cannot justify the abdication of judicial responsibility to interpret constitutional limitations on federal power. Here Congress has sought to use the Commerce Clause as a basis for criminal sanctions on purely local activity. I think that the prohibition of all extortionate credit transactions is not within the congressional power to regulate interstate commerce. I therefore respectfully dissent.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May, one thousand nine hundred and seventy.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALCIDES PEREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 33767

UNITED STATES OF AMERICA,

—v.—

ALCIDES PEREZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR THE ISSUANCE OF AN ORDER STAYING THE MANDATE OF THIS COURT AND CONTINUING THE APPELLANT ON BAIL PENDING APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To The United States Court Of Appeals For The Second Circuit:

The appellant above named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled case and in support of this petition represents to the Court as follows:

The appellant reserves his argued position as to each of the points heretofore raised on appeal, but in this petition

addresses himself solely to those aspects of the opinion of this court decided on May 1, 1970 wherein the court may be convinced that its result is based on the misapprehension of certain matters pertaining to the issues originally raised on appeal.

Therefore, this petition respectfully seeks to convince the court that it has erred in its determination as to the constitutionality of Chapter 42, Title 18, United States Code.

If the instant petition for rehearing is denied, the appellant Perez respectfully petitions this court for the issuance of an order staying the mandate of this court and continuing him on bail pending the disposition of a Petition for a Writ of Certiorari to be filed with the Supreme Court of the United States in accordance with the statutes and rules applicable thereto.

As To A Rehearing Of The Limited Aspects Of This Appeal

Chapter 42 of Title 18, United States Code, Constitutes Federal Criminal Sanctions of Intrastate Activity.

In his brief and during his argument, the appellant urged upon this Court that a crucial distinction between the Congressional exercise of power under the Commerce Clause previously sanctioned by the Supreme Court and Chapter 42 is that the latter constitutes a criminal offense against the United States. In its opinion affirming appellant's conviction and declaring Chapter 42 constitutional, this court indicated by its reasoning and by the authority it cited that this distinction was at the very most insigni-

ficant. The appellant hopes to persuade the court that this distinction is of critical importance to the question of the constitutionality of Chapter 42 and that in the light of this distinction the court will reconsider its conclusions.

Laws that proscribe particular kinds of activity by criminal sanction reflect both in terms of the activity proscribed and the sanction imposed, the attitude and views of the societal or governmental unit which makes the laws. As a result, a class of conduct which is proscribed in one state may not be proscribed in another; the penalty for the commission of a crime in one state may be vastly different in degree from that imposed in another. The benefit that results from this kind of cultural relativism is that a criminal defendant having been conditioned by the ethics and mores of a geographical area will be governed by a set of procedures and penalties that reflect the very same mores and ethics that conditioned his unlawful act. When a young child smears paint on the walls of his home, he is subject to and can rightfully expect responses from his parents based upon the attitudes and value structures which they have instilled in him. Yet when the young child smears paint on the walls of his neighbor's house he will expect a different set of responses and in a very real sense, he is committing a different act. When a defendant has committed an act punishable by the laws of the State of New York, he subjects himself to the procedures and penalties of the State of New York. When a defendant has committed an act which intrudes upon interstate commerce, two things occur:

(1) He makes himself subject to a different set of procedures and sanctions, and properly so, and

(2) He invests in the United States a legitimate interest in deterring such conduct.

Unfortunately, and we submit unconstitutionally, Chapter 42 of Title 18 of the United States Code, does not limit the scope of its application to conduct which does in fact affect commerce. Not only does this Chapter fail to exclude from its sanctions acts completely intrastate, it totally precludes, by operation of the Congressional Findings and Declaration of Purpose, any possibility of such exclusion. The terrible result is that this Chapter proscribes and punishes conduct which it was never intended to affect.

While this kind of legislation can be countenanced in other areas, it cannot be tolerated when one who may be innocent of any violation of *Federal* interest is swept up indiscriminately by this statutory dragnet and made subject to a possible incarceration of twenty years.

The effect of Chapter 42 is the proscription of a class of conduct, some of which conduct Congress is empowered to proscribe. When the procedures by which the guilt or innocence of a criminal defendant are to be affected and the jeopardy that attaches once the determination of guilt is made is fixed as a result of a finding that interstate commerce is affected, due process requires that such a finding be proven in each and every case beyond a reasonable doubt.

II.

The Rationality of the Congressional Findings and Declaration of Purpose

Even if this court were to decide that an effect on interstate commerce need not be proven in each prosecution under this Chapter, the appellant nevertheless submits that the statute would still be unconstitutional by reason of the fact that there was an insufficient basis for the Congressional Findings and Declaration of Purpose.

At the outset, appellant contends that where, as here, the statutory scheme precludes any possible exclusion of instances of conduct not intended to be within its purview, the courts must require more than merely a rational basis for such Congressional Findings. We submit that such Findings must be logically compelled by all the creditable evidence available. But rather than reargue the standard of review in this Petition, we submit that the Congressional Findings do not even measure up to the standard applied by this court in its opinion or, to put it simply, that there is no rational basis for these Congressional Findings. Reducing the Congressional Findings and Declaration of Purpose to its three critical elements, Congress found:

> (1) A substantial part of the income of organized crime is generated by extortionate credit transactions;
>
> (2) Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the prosecution of constitutional rights;

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

Analyzing these elements separately, we find that Congress has concluded that a substantial part of the income of organized crime is generated by extortionate credit transactions. This conclusion was reached despite the fact that the present state of information available regarding organized crime is at best only tentative. In fact, "Evidence of the lack of professional attention to the economy of the underworld is the absence of reliable data even on the magnitude involved, of techniques for estimating them—even of a conceptual scheme for distinguishing profits, income, turnover, transfers, waste, destruction, and *the distribution of gains and losses due to crime.*" [Emphasis Supplied] Schelling, Economic Analysis and Organized Crime, The President's *Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime,* page 114. It is significant that the above quotation comes out of the very authority which this court cited in support of its conclusion that the Congressional Findings had a rational basis. To state it simply, the thrust of our contention here is that information on that amorphous entity referred to in the Findings as Organized Crime available even now is far too uncertain and unauthoritative upon which to base any rational finding.

In its Findings, Congress stated, presumably as a reason for its action, that the existence of exclusionary rules of

evidence stricter than necessary for the protection of Constitutional rights has been among the factors which have rendered past efforts at prosecution almost wholly ineffective. Presumably, Congress feels that by bringing loan sharking under Federal prosecutorial procedures, the impediment caused by these exclusionary rules would be removed or reduced because the Federal exclusionary rules are less strict. Rather than belabor the point, suffice it to say that such a Congressional Finding boggles the mind and "amazes indeed the very faculties of eyes and ears."

With respect to the third excerpt from the Congressional Findings, Congress first finds that extortionate credit transactions are substantially carried on in interstate and foreign commerce and through the means and instrumentalities thereof. If a given extortionate credit transaction is carried on in interstate commerce and through the means and instrumentalities thereof, then that fact can be proven like any other during the criminal prosecution. Congress gives no reason nor can we think of any why the burden of proving such an element would be so great as to frustrate the legitimate purposes and interests of the Government.

Finally, Congress found that "even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." This is the true quintessence of the Findings relative to the issues we raise herein. The lack of a rational basis for this particular Finding is eloquently established by what the Congress fails to find. Congress did not state how or why in intrastate extortionate credit transactions directly affect interstate commerce.

Of course, Congress did not find that each intrastate extortionate credit transaction directly affects interstate commerce. In the various cases decided by the Supreme Court and cited by this Court beyond authority for its conclusion that Chapter 42 is constitutional, the activities sought to be regulated by Congress under the Commerce Clause had on their face a very direct involvement with interstate commerce. To put it simply, the operation of a loan shark does not necessarily or even logically relate or affect interstate commerce except in the most tenuous way.

Appellant submits that there is no rational basis for the Congressional Findings embodied in Chapter 42 and that in the area of criminal sanctions, more than a rational basis would have to be found to support such a scheme. Nevertheless, should the court remain unconvinced by the above discussion, we submit that at the very least this court should remand this case to the Trial Court for a hearing on the question of the rationality of the Congressional Findings and Declaration of Purpose. The judiciary will have abdicated its function unless and until it is in a position to pass upon the rationality of the Congressional Findings obtained from a full evidentiary hearing at which the proper safeguards would apply. See *Leary* v. *United States,* 395 U.S. 6; *United States* v. *Adams,* 293 F. Supp. 776.

Conclusion

As To Staying the Issuance of the Court's Mandate and Continuing the Appellant on Bail Pending Application for a Writ of Certiorari to the Supreme Court.

If this Court should deny the instant petition for a rehearing the appellant Perez intends to present to the United States

Supreme Court a petition for a writ of certiorari. It is respectfully prayed that the issuance of the mandate of this court be stayed and the petitioner continued on bail until the determination of said petition for a write of certiorari.

Bail pending appeal as to appellant Perez has been heretofore set in the amount of Ten Thousand Dollars. It is respectfully submitted that the questions above discussed as well as those set forth in the original appeal are not frivolous but in fact are questions of great substance and significance which merit a review by the United States Supreme Court.

No prior application for the relief sought herein has been made.

For the foregoing reasons, appellant herein respectfully requests that a rehearing be granted or that, in the alternative, the issuance of the mandate of this court be stayed and the appellant Perez continued on bail pending the filing and disposition of his petition for a writ of certiorari to the Supreme Court of the United States.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Appellant Perez
Office & P. O. Address
401 Broadway
New York, New York 10013
(212) WA5-5937

Dated: June 12, 1970

Appendix C—Petition for Rehearing

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALBERT J. KRIEGER, being first duly sworn, on oath certifies and says:

That he is the attorney for the appellant in this cause; that he makes this certificate in compliance with the rules of this court; that in his judgment the within and foregoing petition is well founded and is not frivolous or interposed for delay.

ALBERT J. KRIEGER

(Subscribed and sworn to before me this 12th day of June, 1970)

IVAN S. FISHER
Notary Public, State of New York
No. 60-1231363
Qualified in Westchester County
Commission Expires March 30, 1971

Appendix C—Petition for Rehearing

Suggestion for a Rehearing in Banc

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket Number 33767

[Same Title]

The Petitioner, Alcides Perez, suggests to this court that his Petition for a Rehearing in the above-entitled case and filed on even date herewith be heard in banc for the following reasons:

(1) The issues raised by the Petitioner in his Petition for a Rehearing directly confront the issue of the constitutionality of Chapter 42, Title 18, United States Code, which proscribes extortionate credit transactions. The constitutionality of this Chapter was first presented for review to this Circuit in this case and has not been decided upon by the Supreme Court of the United States. The importance of the questions raised in Petitioner's appeal are of great significance.

(2) The decision entered by this Court affirming Petitioner's conviction came five months after oral argument and in this Court's Opinion it was acknowledged that Petitioner's argument had force.

(3) The issues presented in Petitioner's original appeal resulted in a division of the three-Judge panel and as a result Judge Hays wrote a strong dissent.

Appendix C—Petition for Rehearing

WHEREFORE, the Petitioner, Alcides Perez, respectfully suggests that he be granted a rehearing of the above appeal in banc.

Yours, etc.,

ALBERT J. KRIEGER
Attorney for Petitioner Alcides Perez
Office & P.O. Address
401 Broadway
New York, New York 10013
(212) WA 5-5937

APPENDIX D

Order of the United States Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALCIDES PEREZ,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that

1. The petition for rehearing is denied.

2. The mandate is stayed pending application for certiorari subject to Rule 41(b) of the Federal Rules of Appellate Procedure.

Appendix D—Order of the United States Court of Appeals Denying Rehearing

3. Appellant be allowed to continue on bail provided that a petition for certiorai is filed in accordance with said Rule 41(b).

STERRY R. WATERMAN
PAUL R. HAYS
WILFRED FEINBERG
Circuit Judges

July 1, 1970

APPENDIX E

Order of the United States Court of Appeals Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

33767

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALCIDES PEREZ,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

July 1, 1970

APPENDIX F

ARTICLE 1, SECTION 8, CLAUSE 3 and CLAUSE 4:

Article 1, Section 8 of the Constitution of the United States provides in relevant part:

> "The Congress shall have power . . .
>
> Clause 3 To regulate commerce with foreign Nations, and among the several states,—
>
> Clause 4 To establish uniform laws on the subject of Bankruptcies throughout the United States;—"

FIFTH AMENDENT:

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

TENTH AMENDMENT:

The Tenth Amendment of the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appendix F—Constitutional Amendments and Statutory Provisions

TITLE 28, UNITED STATES CODE, SECTION 1254(1)

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By wri of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

TITLE 18, UNITED STATES CODE, SECTION 891

§ 891. DEFINITIONS AND RULES OF CONSTRUCTION FOR THE PURPOSES OF THIS CHAPTER:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub.L. 90—321, Title II, § 202(a), May 29, 1968, 82 Stat. 159.

TITLE 18, UNITED STATES CODE, SECTION 892

§ 892. MAKING EXTORTIONATE EXTENSIONS OF CREDIT

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and

interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added Pub.L. 90—321, Title II, § 202(a), May 29, 1968, 82 Stat. 160.

Appendix F—Constitutional Amendments and Statutory Provisions

TITLE 18, UNITED STATES CODE, SECTION 893

§ 893. FINANCING EXTORTIONATE EXTENSIONS OF CREDIT

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

TITLE 18, UNITED STATES CODE, SECTION 894

§ 894. COLLECTION OF EXTENSIONS OF CREDIT BY EXTORTIONATE MEANS

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more

extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892(b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

TITLE 18, UNITED STATES CODE, SECTION 895

§ 895. IMMUNITY OF WITNESSES

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter is

necessary to the public interest, he, upon the approval of the Attorney General or his designated representative, may make application to the court that the witness be instructed to testify or produce evidence subject to the provisions of this section. Upon order of the court the witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor may testimony so compelled be used as evidence in any criminal proceeding against him in any court, except a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 162.

TITLE 18, UNITED STATES CODE, SECTION 896

§ 896. EFFECT ON STATE LAWS

This chapter does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter. No law of any State which would be valid in the absence of this chapter may be held invalid or inapplicable by virtue of the existence of this chapter, and no officer, agency, or instrumentality of any

State may be deprived by virtue of this chapter of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 162.

RULE 19, SUPREME COURT RULES

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceed-

ings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 600

ALCIDES PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on all five counts of an indictment charging the unlawful use of extortionate means in collecting and attempting to collect a debt from one Alexis Miranda, in violation of 18 U.S.C. 891 and 894. On May 23, 1969, he was sentenced to concurrent terms of eighteen months' imprisonment. The court of appeals affirmed, one judge dissenting (Pet. App. A, 1a-23a).

Petitioner contends, as he did below, that the statute under which he was convicted, which punishes loansharking activities without requiring a showing in any individual case of an effect of such activities on interstate commerce, is an unconstitutional exercise of Congress' Commerce and Bankruptcy Clause powers. He argues that the formal congressional findings on which the statute is based—which reflect the linkage of loansharking with organized crime and the deleterious effect of extortionate credit transactions on interstate commerce and bankruptcy proceedings—are suspect. These contentions are answered in the thorough opinion of the majority below,[1] on which we rely here (Pet. App. A, 1a-19a). See also *United States* v. *Biancofiori*, 422 F.2d 584 (C.A. 7), certiorari denied, 398 U.S. 942.[2]

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[1] The dissenting opinion takes the view, as to the Commerce Clause aspect, that the statute goes too far since it requires no showing in a particular case that the extension of credit was linked to organized crime. As the majority points out, however, Congress is entitled to view the entire class of transactions in terms of their effect on interstate commerce (Pet. App. A, 10a-11a). Congress could reasonably conclude from its various studies and hearings (Pet. App. A, 13a-16a) that the typical extortionate credit transaction is linked to interstate organized crime and thus that the entire class of such transactions is a subject of proper federal control.

[2] While the majority in the instant case found it unnecessary to discuss the validity of the statute under the Bankruptcy Clause since it was sustainable under the Commerce Clause, the opinion in *Biancofiori* upholds the statute under both clauses.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER, 1970.

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FILED
JAN 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 600

ALCIDES PEREZ,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF

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Of Counsel

INDEX TO BRIEF

IN THE

Supreme Court of the United States

October Term, 1970

No. 600

ALCIDES PEREZ,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF

Opinion Below

The United States Court of Appeals for the Second Circuit rendered an opinion by Circuit Judge Wilfred Feinberg. It is reproduced in the Single Appendix, pp. 13a-32a. This opinion is reported at 426 F. 2d 1073.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on May 1, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) by a Petition for a Writ of Certiorari filed on August 26, 1970 and granted by the Court on November 16, 1970.

Question Presented

Whether Chapter 42 of Title 18, United States Code, Sections 891, 892, 893, and 894 constitute unconstitutional exercises of legislative power by Congress.

Constitutional, Statutory and Other Provisions Involved

Article 1, Section 8, Clause 3 and Clause 4 of the Constitution of the United States;

Tenth Amendment of the Constitution of the United States;

Title 28, United States Code, Section 1254(1);

Title 18, United States Code, Sections 891, 892, 893, and 894;

Section 201, Public Law 90-321: Congressional Findings and Declaration of Purpose;

Title 18, United States Code, Section 1952.

Statement of the Case

The Petitioner, Alcides Perez, was convicted in the United States District Court for the Eastern District of New York before the Honorable George Rosling and a jury on five counts of using extortionate means to collect or attempt to collect extensions of credit within the Eastern District of New York in violation of Title 18, United States Code, Sections 891 and 894. The Petitioner was sentenced to eighteen months imprisonment on each count to run concurrently.

The Petitioner challenged the constitutionality of the statutes under which he was convicted by a motion to dismiss the indictment at his trial and in his appeal of the subsequent conviction to the United States Court of Appeals for the Second Circuit. The Court of Appeals found Chapter 42 of Title 18, the Federal anti-loan sharking statute, constitutional, the Honorable Paul R. Hays, Circuit Judge, dissenting.

Title 18, United States Code, Chapter 42, Sections 891 through 896 deal with "extortionate credit transactions" and was enacted as Title II of the Consumer Credit Protection Act of 1968. The statute was a far reaching attempt to control "the vicious billion dollar a year loan sharking racket". Section 891 defines "extortionate extension of credit" as one in which the understanding of both creditor and debtor is that failure to make timely repayment "could result in the use of violence or other criminal means to cause harm to the person . . ." Title 18, United States Code, Section 891.

Section 892(a) imposes the onerous penalty of imprisonment of not more than twenty years or a fine of not more than $10,000.00 or both for the making of an extortionate extension of credit. Sub-section (b) of Section 892 sets forth various indicia that characterize extortionate credit extensions such as excessive interest rate, legal unenforceability of the obligation, and the reasonable belief of the creditor that he will come to harm if he fails to comply with the terms of his agreement.

Section 893 proscribes the "financing of extortionate credit transactions."

Finally, Section 894(a) punishes the collection or attempt to collect credit extensions by "extortionate means". Section 894(a)(1) provides the same penalty as enumerated in Section 892(a), *supra*.

Legislative History

The statutory system here involved had its inception in an Amendment offered on the floor of the House of Representatives to a Bill undertaking consumer protection in a variety of areas. The original Amendment, presented and passed on February 1, 1968 (See the Congressional Record, H 706, February 1, 1960), contained a number of proposed legislative findings detailing the alleged impact on interstate commerce of "loan sharking" activities.

The bill itself, however, as then proposed, undertook to prohibit loan-sharking in a variety of ways only where there was an actual impact proved on interstate commerce or where interstate facilities were in any way utilized.

The ultimate bill was a result of extensive rewriting in the conference between the House and Senate. It is obvious the two critical decisions were made during the process of rewriting. The first was to eliminate the necessity for proving in individual cases that commerce was affected by seeping legislative findings that loan sharking was an activity of organized crime, that organized crime operated across state lines and that the transactions described were in interstate commerce areas or affected it. The second decision was to rely on congressional power to establish uniform laws of bankruptcy as an alternative basis for the congressional action undertaken.

ARGUMENT

Chapter 42 of Title 18, United States Code, Sections 891, 892, 893 and 894 constitute unconstitutional exercises of legislative power by Congress.

With full awareness of the sweep of judicial decisions that have sanctioned increasingly broad exercise of Congressional power under the commerce clause, the Petitioner nonetheless contends that the statutory sections under which he was tried and convicted represents an invalid exercise of Congressional power.

In the section embodying Congressional findings and declaration of purpose two purported bases were set forth for the unprecedented exercise of power that was undertaken.

The first basis was, of course, the congressional power under the commerce clause (Article 1, Section 8, Cl. 3, United States Constitution).

The second basis was found in the Congressional power to establish uniform and effective laws on the subject of bankruptcy (Article 1, Section 8, Cl. 4, United States Constitution). This will be discussed later but it may be appropriate to comment here simply that no exercise of Congressional power under the bankruptcy section remotely resembling that set forth in the statutory sections involved has ever been undertaken before, that there is no judicial authority in point, and that the use of the bankruptcy authority on its face is strained, labored, and bizarre.

A.

The Commerce Clause

Despite the fact "that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense", *United States* v. *Perez,* 426 F. 2d 1073 at 1075, the instant legislation proscribes all extortionate credit transactions whether or not, in an individual case, the transaction affects interstate commerce. Rather than require that the Federal underpinning be proven in each prosecution Congress instead asserted its jurisdiction on the basis of certain "Findings and Declaration of Purpose:

> (a) The Congress makes the following findings:
>
> (1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.
>
> (2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy." Section 201 of Pub. L. 90-321, 82 Stat. 146, 159 (1968).

These Findings and Declaration of Purpose constitute the supporting structure upon which Congress erects federal prohibitions against all extortionate demands for repayment of monies regardless of the jurisdictional character of the underlying transaction, as well as supplanting the customary proof of impact upon interstate commerce.

The effect of relieving the Government of the burden of proving the interstate element in the Trial Court in the manner of the statutory requirement under Section 1952 of Title 18, United States Code, prompts a comparison between this statute and the analysis of the presumption of knowledge of illegal importation as made by the Court in *Leary* v. *United States,* 395 U.S. 6. Applying the "rational connection" test employed there to this case, the

Findings and Declaration of Purpose themselves show how short they fall.

Finding One

In a statute designed to strike at organized crime, Congress has made a finding that organized crime is interstate in character and that a substantial part of its income is found to be generated by extortionate credit transactions.

At best, Congress has indicated that some extortionate credit transactions are a source of revenue to organized crime but flowing therefrom is not the rational connection between all extortionate credit transactions as a class and organized crime.

Congress did not inquire into extortionate credit transactions per se or to the effect of such transactions on interstate and foreign commerce. The evidence before Congress was specifically directed towards the involvement of organized crime in this type of criminality. As for instance, before the Select Committee on Small Business, May 14, 1968, the Chairman, Senator George A. Smathers, said "The purpose of the present hearings is to build a factual record on the impact of organized crime on the nation's smaller business enterprises." Hearings on Impact of Crime on Small Business, S. Comm. on Small Business, 90th Cong., 2d Sess. (1968), Statement of Senator George A. Smathers, Page 1. This language described the purpose of the Congressional efforts in the other hearings conducted. Federal Effort Against Organized Crime: Report of Agency Operations, House Report No. 1574, 90th Cong., 2d Sess. (1968); Hearings on the Federal Effort Against Organized Crime, S. Comm. on Government Operations, 90th Cong., 1st Sess. (1967).

FINDING TWO

Congress has here described some of the less attractive aspects of these types of credit transactions but offers little guidance therein to assist in determining whether there was a valid exercise of Congressional powers in the enactment of the statute.

FINDING THREE

At face value Congress indicates that there are extortionate credit transactions in interstate commerce but it also acknowledges that there are credit transactions "purely intrastate in character". Without the benefit of evidentiary findings or a factual basis Congress has found here that these credit transactions "purely intrastate in character" "directly affect interstate commerce". Thus, Congress declares a particular area of criminal conduct subject to its regulatory powers under the commerce clause and indiscriminately sweeps a broad mass of intrastate crime into that class. Congress makes a federal offense of a pattern of intrastate criminal behavior which cannot be magnetically attracted into the proscribed category under the diminimus analysis referred to in *Maryland* v. *Wirtz*, 392 U.S. 183. As indicated above in commenting on Finding One, Congress was not taking evidence on extortionate transactions per se, but was investigating organized crime.

Although this Court has upheld the power of Congress under the Commerce Clause to regulate apparently intrastate activities, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) and *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), never has this Court upheld such regulation over so broad and unrestricted a class. This statute bars all extortionate credit transactions regardless of amount, relationship be-

tween the parties, the number of such transactions made by a co-defendant, or whether the lender is independent or in association with others. The unqualified, all-pervasive scope of conduct proscribed here stands in sharp contrast to previous legislation of this kind where Congress has required a definite and limiting relationship to interstate commerce. In *Atlanta Motel, supra,* the statute was applicable only to motels which provide lodging to transient guests; In *McClung, supra,* to restaurants that served food, a substantial portion of which had "moved in commerce"; and in *Maryland* v. *Wirtz, supra,* to employees of enterprises engaged in commerce or in the production of goods for commerce.

> "Every trivial, insignificant and purely local act of the kind condemned is made a federal crime without any requirement of showing any connection with or effect upon interstate commerce. It is quite clear that not every extortionate act, no matter how small the debt involved, has any significant effect on interstate commerce.
>
> There is no reason to believe that using threats to collect debts has any more effect upon interstate commerce than any other crime involving property. If extortionate conduct unrelated to interstate commerce can be made a federal crime, so can such crimes as robbery, burglary and larceny."
>
> *Dissenting Opinion of Judge Hays, United States* v. *Perez,* 426 F. 2d 1073 at 1082.

If Congress can punish under the Commerce Clause local loan-sharking solely on the basis of its own unreviewed, irrefutable findings, can it not punish any crime relating in any way to money or property committed anywhere in this country?

B.

Bankruptcy Clause

Article 1, Section 8, Clause 4 of the United States Constitution authorizes Congress to establish "uniform laws on the subject of bankruptcies throughout the United States . . . " As explained in the conference report on this legislation, the purpose of the bankruptcy laws was to permit debtors to discharge certain obligations, and that purpose could not be achieved with regard to obligations concerning which extortionate means were employed. To undertake to impose criminal penalties with regard to loans to individuals not in bankruptcy and who do not go into bankruptcy on the possibility that they might go into bankruptcy, seems to us an extravagant interpretation of the bankruptcy power. If the bankruptcy section is found to sustain this kind of power, it is hard to visualize any kind of commercial transaction for which a rationale could not be found that would bring it within the Congressional bankruptcy clause.

In large measure we rest our attack on the fourth finding on the words of Judge Hays in his dissenting opinion in the Court below:

> "The statute is clearly not a uniform law on the subject of bankruptcy. Congress has sought to justify the statute on the ground that, if extortionate means are used to collect an extension of credit, the debtor may be deprived of his right to a discharge in bankruptcy. But this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to us

to be capable of such an all-inclusive construction. Making a federal crime of every threat to collect or attempt to collect an extension of credit is not reasonably related to assuring debtors of their right to discharge in bankruptcy. The relationship is so artificial and tenuous that the power to enact the statute cannot properly be rested on the Bankruptcy Clause." *Dissenting Opinion of Judge Hays,* Page 20 *United States* v. *Perez,* 426 F. 2d 1073.

The basis for this statutory scheme is invalid and unconstitutional.

C.

The Evidence Before The Legislature

Whatever evidence that Congress had before it at the time of the enactment of the statute offered no real support to the validity of the findings. For instance, The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime.

> "No comprehensive analysis has ever been made of what kinds of customers loan sharks have or of how often each kind borrows." *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime,* at page 3.

> "Evidence of the lack of professional attention to the economy of the underworld is the absence of reliable data even on the magnitude involved, of techniques for estimating them—even of a conceptual scheme for distinguishing profits, income, turnover, transfers, waste, destruction, and the distribution of gains and losses due to crime." Schelling, Economic Analysis and Organized Crime, *The President's Com-*

mission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, page 114.

The testimony of various witnesses before the Select Committee on Small Business, United States Senate, 90th Cong., on May 14, 15, and 16 of 1968, if anything revealed the lack of definitive information rationally indicating what percentage of credit transactions were interstate in character and what percentage were intrastate, or what credit transactions were connected with organized crime and what credit transactions were not.

The remaining evidence was similarly unilluminating.

CONCLUSION

Chapter 42 of Title 18, United States Code, constitutes an indiscriminate federal proscription of intrastate criminal activity on the basis of insufficient legislative findings which are themselves unsupported by the evidence that was available to the Congress. Accordingly, the judgment of the Court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1970

No. 600

ALCIDES PEREZ,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITIONER'S BRIEF

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INDEX TO APPENDIX

Constitutional, Statutory and Other Provisions Involved

Article 1, Section 8, Clause 3 and Clause 4:

Article 1, Section 8, of the Constitution of the United States provides in relevant part:

> "The Congress shall have power . . .
> Clause 3 To regulate commerce with foreign nations, and among the several states, —
> Clause 4 To establish uniform laws on the subject of Bankruptcies throughout the United States; —"

Tenth Amendment:

The Tenth Amendment of the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title 28, United States Code, Section 1254(1):

§ 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree.

Title 18, United States Code, Section 891:

§ 891. Definitions and Rules of Construction For The Purposes of This Chaper.

Constitutional, Statutory and Other Provisions Involved

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledge or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to

cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Title 18, United States Code, Section 892:

§ 892. Making Extortionate Extensions of Credit.

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

Constitutional, Statutory and Other Provisions Involved

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added. Pub. L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 160.

Title 18, United States Code, Section 893:

§ 893. Financing Extortionate Extensions of Credit.

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

Added Publ. L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

Constitutional, Statutory and Other Provisions Involved

Title 18, United States Code, Section 894:

§ 894. Collection of Extensions of Credit By Extortionate Means.

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the

reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub. L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

Congressional Findings and Declaration of Purpose.

Section 201 of Pub. L. 90-321 provides that:

(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United States Code [this chapter] are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy.

Title 18, United States Code, Section 1952.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs to attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub. O. 89-68, July 7, 1965, 79 Stat. 212.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 600

ALCIDES PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 13a–35a) is reported at 426 F. 2d 1073.

JURISDICTION

The judgment of the court of appeals (A. 12a) was entered on May 1, 1970. Petitions for rehearing and for rehearing *en banc* were denied on July 1, 1970 (A. 36a, 37a). On July 27, 1970, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including August 28, 1970. The petition was filed on August 26, 1970, and was granted on November 16, 1970 (A. 38a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title II of the Consumer Credit Protection Act of 1968, which proscribes extortionate credit transactions, is a permissible exercise of congressional authority under the Commerce Clause of the Constitution.

2. Whether this legislation is, in any event, valid under the Bankruptcy Clause of the Constitution.

STATUTES INVOLVED

Title II ("Extortionate Credit Transactions") of the Consumer Credit Protection Act (P.L. 90–321, 82 Stat. 159, 18 U.S.C. (Supp. V) 891, 892, 893, 894, 896) in pertinent part provides as follows:

§ 201. *Findings and purpose*

(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evi-

dence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy.

§ 202. *Amendments to title 18, United States Code*

(a) Title 18 of the United States Code is amended by inserting the following new chapter immediately after chapter 41 thereof:

"CHAPTER 42—EXTORTIONATE CREDIT TRANSACTIONS

* * * * *

"§ 891. *Definitions and rules of construction*

"For the purposes of this chapter:

* * * * *

"(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

"(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

* * * * *

"§ 892. *Making extortionate extensions of credit*

"(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

* * * * *

"§ 893. *Financing extortionate extensions of credit*

"Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced,

whichever is greater, or shall be imprisoned not more than 20 years, or both.

"§ 894. *Collection of extensions of credit by extortionate means*

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

"(1) to collect or attempt to collect any extension of credit, or

"(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned no more than 20 years, or both.

* * * * *

"§ 896. *Effect on State laws*

"This chapter does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter. No law of any State which would be valid in the absence of this chapter may be held invalid or inapplicable by virtue of the existence of this chapter, and no officer, agency, or instrumentality of any State may be deprived by virtue of this chapter of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter."

STATEMENT

Petitioner was convicted, after a jury trial in the United States District Court for the Eastern District of New York, on five counts of unlawfully using extortionate means in collecting and attempting to collect an extension of credit, in violation of 18

U.S.C. 894(a)(1), and was sentenced to concurrent terms of eighteen months' imprisonment. The court of appeals affirmed (A. 13a–31a), one judge dissenting (A. 32a–35a).

1. At trial, the government's principal witness was the victim of petitioner's extortion scheme, Alexis Miranda, a man twenty-six years of age, married and with three children, who had worked as a butcher since the age of sixteen. Miranda testified that, in early January 1968, he opened his own butcher shop in Brooklyn, New York, after reaching an understanding with some meat suppliers as to credit (Tr. 47–51, 133–134, 142–147). Finding himself in need of cash, he tried unsuccessfully to obtain a loan from the Chase Manhattan Bank; he also learned from the Small Business Administration that any SBA loan would take at least eight weeks to process. Miranda then sought assistance from an acquaintance,[1] who, he said, sent him to a restaurant in Brooklyn on January 23, 1968, to meet a man named "Sabu," identified at trial as petitioner (Tr. 51–55, 147–150).

At the restaurant, Miranda, accompanied by his employee Santana, met with petitioner and explained that he owned his own butcher shop and wanted to borrow some money; he asked for $1,000. After making a telephone call, petitioner agreed to the loan and left for the money. He returned about fifteen minutes

[1] The government tendered the name of Miranda's acquaintance (Herbie Valez) to the defense, and informed defense counsel that Valez's testimony before the grand jury in certain respects conflicted with the trial testimony of Miranda. Defense counsel declined to call Valez as a witness (Tr. 303–305).

later and handed Miranda $1,000, stating that Miranda would have to repay the amount in installments of $105 per week for fourteen weeks, with the money to be picked up by petitioner at the butcher shop every Tuesday (Tr. 56–61, 63–64, 151–155).

Miranda paid petitioner $105 weekly for six to eight weeks, and was then informed that he would have to pay $25 extra, or $130, for each of the remaining weeks; petitioner gave as a reason that he had to get the interest faster. Miranda thereafter paid $130 for some weeks (Tr. 66–68, 155).

In March 1968, when petitioner came to the butcher shop to collect the weekly payment, Miranda asked to borrow an additional $2,000 to build up the business by stocking certain groceries and to put up shelves in the shop (Tr. 167, 169–170). This loan was arranged after Miranda agreed to make weekly installment payments on both the $1,000 and the $2,000 loans of $205; petitioner then left and returned about an hour later with $2,000, remarking that Miranda now owed him $3,000 (Tr. 68–71, 85–87, 168).

Three or four weeks later, petitioner informed Miranda that he had "too much money in the street," that the money belonged to his boss, and that he had to collect it. Miranda was told to pay $330 a week; when he objected, petitioner related a story about a man who refused to pay and ran away to Massachusetts, saying that he had sent that man to the hospital. Miranda then began paying $330 per week and continued to do so through the month of June 1968 (Tr. 74–77, 88–93).

In early July, Miranda testified, he closed his shop early on the day of a scheduled payment so as to avoid petitioner, but petitioner came to his home and, shouting obscenities, demanded $500 on the following Monday (Tr. 94–98). Miranda was able to meet this $500 payment; the following Saturday, he gave petitioner another $500. On this latter occasion, petitioner stated that it looked like Miranda was going to run away. After Miranda denied any such intent, petitioner advised him that he would be at the store the next Saturday to collect a payment of $1,000. Miranda was able to make this payment by not paying anything to his suppliers that week (Tr. 104–107).

Faced with another $1,000 payment on the next Saturday, Miranda closed his butcher shop, sold all his stock and fixtures for $300, sent his wife to live with her sister in the Bronx, and, later in the week, himself went to Puerto Rico for about two weeks. Prior to leaving, however, he visited the District Attorney's office and, while there, spoke to F.B.I. agent Roselli about his dealings with petitioner (Tr. 108–113, 197, 386–398).

2. On his return from Puerto Rico, Miranda went to work in Conte's Meat Market in Brooklyn. In early September, petitioner came to Miranda's home and, while remaining outside, conversed with Miranda's wife. Miranda, who was inside, overheard petitioner say, "I know he's there, you are lying. I know he's in there because I got a few friends of mine that are watching the place." Petitioner told Miranda's wife to tell her husband he wanted to see him as soon as possible "or else." When she asked

what "or else" meant, petitioner responded that if she wanted, he could "send a couple of friends of [his] up here." Mrs. Miranda replied that if petitioner was threatening her, she could call the F.B.I.; petitioner thereupon left (Tr. 114–116).

Miranda did not go to see petitioner and returned to work the next day. However, in mid-September, petitioner came to Conte's Meat Market and spoke to Miranda. He told Miranda that he was a lucky guy; that he had run away and petitioner could have him "castrated" (Tr. 119–120); and that he should bring $100 to a luncheonette that evening. Miranda telephoned the F.B.I. That evening he went to the luncheonette, but without the money. Petitioner then told Miranda that he could afford $100 per week; that he still owed him $6,400 or $6,700; that it did not matter how he obtained the money so long as he made the weekly $100 payments; and that petitioner was being "nice" to Miranda—that the people to whom petitioner would shortly be turning over his collections would not be so nice, and, if Miranda failed to pay, they would put him in the hospital. Miranda offered to pay $25 per week, but petitioner would not agree. When Miranda mentioned that he had sold the butcher shop, petitioner stated that he should have been consulted so that his people could have arranged an auction sale permitting the store to be purchased in someone else's name; Miranda could then have continued to work there while paying back the loan. Petitioner then told Miranda he wanted $100 the next day (Tr. 118–124).

The following day, petitioner again tried to collect the $100, but Miranda did not have the money. After petitioner left, Miranda called the F.B.I. and informed them what had happened (Tr. 124–126). A few days later, on October 2, 1968, petitioner and Miranda met again. Miranda said the best he could do was to pay petitioner $25 per week; petitioner said that that was no money. Miranda then responded: "Already I paid you * * * the triple of the loan." Petitioner told Miranda that he should steal or sell drugs if necessary to get the money to pay him; that even if he was caught and put in jail, it was better to be in jail than in the hospital with a broken back or legs. He added: "I could have you sent to the hospital, you and your family, any moment I want with my people" (Tr. 126–131).

Following this conversation, Miranda again spoke with F.B.I. agent Roselli, and that same day petitioner was arrested (Tr. 401–402). His conviction followed[2] and the court of appeals affirmed, denying a petition for rehearing with suggestion for rehearing *en banc*.

SUMMARY OF ARGUMENT

I

The Commerce Clause of the Constitution (Art. I, § 8, cl. 3), together with the Necessary and Proper Clause (Art. I, § 8, cl. 18), gives to Congress the power to regulate both interstate commerce and intrastate

[2] Miranda's testimony at trial was corroborated by his employee, Santana, who accompanied Miranda on his initial meeting with petitioner (Tr. 267–273, 275–279), and by Miranda's wife (Tr. 206–211, 232–237). Petitioner did not call any witnesses, nor did he testify on his own behalf.

activity which "* * * exerts a substantial economic effect on interstate commerce * * *." *Wickard* v. *Filburn*, 317 U.S. 111, 117. In recent years, this Court has construed this regulatory power liberally, expanding it to meet the needs of our increasingly complex society. Thus, it has upheld the constitutionality of statutes regulating the amount of grain that may be raised by farmers for self-consumption, requiring nondiscriminatory service by motels and restaurants (whether or not the particular public accommodation caters to interstate clientele), and regulating wages and hours of all employees of enterprises which buy or sell in interstate commerce (even though an individual employee may not himself be engaged in such commerce or production for such commerce). Moreover, where the proscribed class of conduct, as a whole, has been found by Congress to have a substantial adverse effect on interstate commerce, the Constitution has consistently been held not to require, as a condition to the statute's validity, that there be provision for an independent judicial determination whether commerce has been specifically affected in a particular instance.

Congress has expressly found that extortionate credit transactions, as a class of activity, have substantial adverse economic effect on interstate commerce. The only questions for consideration by this Court are whether that finding has a "rational basis" on "any state of facts known or which could reasonably be assumed by Congress" (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 154) and, if so, whether the means Congress selected to eliminate the evil are

reasonable and appropriate. *Maryland* v. *Wirtz*, 392 U.S. 183, 189–190.

The evidence which served as a basis for the legislative determination to enact Title II of the Consumer Credit Protection Act showed conclusively that the loan shark racket is largely controlled by organized crime; that a substantial part of the funds used by the underworld to finance its activities is derived from extortionate credit transactions; and that these activities are one of the methods by which the underworld obtains control of legitimate businesses. If, as this Court has held, the racial unrest underlying *Katzenbach* v. *McClung*, 379 U.S. 294, and the potential industrial strife underlying *Maryland* v. *Wirtz*, 392 U.S. 183, threatened sufficient economic disruption to interstate commerce to sustain federal regulation of an entire class of activities, certainly organized crime which is "interstate and international in character," which is engaged in activities that "involve many billions of dollars each year," and which is "directly responsible for murders, willful injury to person and property, corruption of officials, and terrorization of countless citizens" (P.L. 90–321, 82 Stat. 159), causes no less a disruptive effect. And loan sharking in itself is harmful to interstate commerce, by diminishing the purchasing capacity of its victims and rendering them, through fear and resultant tension, less productive members of society.

Nor can it reasonably be maintained that the "means" chosen by Congress to combat the evil are unreasonable or inappropriate. The degree to which the loan shark racket is controlled by the organized crime, and the

uses to which the underworld puts both the profits and the leverage that it reaps therefrom, plainly establish the existence of a serious deleterious effect on interstate commerce which it is necessary and appropriate for Congress to regulate. Since effective regulation of the evil can be achieved only by subjecting all extortionate credit transactions to federal proscription, the framing of legislation so as to reach the entire class is fully warranted.

II

The instant legislation also can be sustained on the basis of Congress' power under the Constitution to establish "uniform laws on the subject of Bankruptcies throughout the United States" (Art. I, § 8, cl. 4). Loan shark transactions, by their very nature, "directly impair the effectiveness and frustrate the purposes" of the bankruptcy laws. Plainly, adherence by creditors to the prescribed procedures under law for collection of the debts is an indispensable prerequisite to the effective functioning of any legal scheme aimed at the ordering of the affairs of insolvent persons. When there are creditors who refuse to follow these legal precepts, the meaningful implementation of the bankruptcy laws by all entitled to enjoy their benefits requires that the force of criminal sanctions be brought to bear against such creditors. On this basis, the instant legislation is "necessary and proper for carrying into execution" (see Art. I, § 8, cl. 18) the bankruptcy power with which Congress is invested, and is "plainly adapted" to that end. *McCulloch* v. *Maryland*, 4 Wheat. 316, 409–420.

ARGUMENT

I. CONGRESS IS AUTHORIZED UNDER THE COMMERCE CLAUSE TO PROSCRIBE GENERALLY THE USE OF EXTORTIONATE MEANS TO COLLECT EXTENSIONS OF CREDIT

Petitioner's case here rests entirely on his challenge to the authority of Congress under the Commerce Clause of the Constitution to enact legislation proscribing all "loan sharking" activities, including isolated transactions which are of a purely local character. It is uncontested that petitioner used extortionate means to collect and attempt to collect an extension of credit, in violation of the terms of 18 U.S.C. 894(a), and that the activities for which he now stands convicted are a proper subject for criminal prosecution. His sole contention is that he should have been prosecuted by the state and not by the federal government.[8]

A. *Congress can enact legislation reaching the activity of "loan sharking" under its broad commerce powers.*

There are three distinct categories of conduct subject to federal control under the broad constitutional power given to Congress "[t]o regulate commerce * * * among the several States" (Art. I, § 8, cl. 3). Federal criminal legislation most commonly prohibits activity involving direct misuse of the channels of interstate commerce. Thus, Congress has properly legislated against the transportation across state or

[8] In the court of appeals, petitioner had argued that the evidence at trial was not sufficient to sustain conviction. However, that issue was decided against him below (A. 31a) and no effort has been made to present that issue here.

national boundaries of stolen property (18 U.S.C. 2312), of persons who have been kidnapped (18 U.S.C. 1201), and of persons or things being transported for unlawful or immoral purposes (18 U.S.C. 1952, 2421). In such cases, federal intervention has been deemed necessary to prohibit the use of interstate transportation to effect the evil intended. See, *e.g.*, *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.* 299 U.S. 334, 348–350; *Hoke* v. *United States,* 227 U.S. 308, 322–323; *Champion* v. *Ames,* 188 U.S. 321, 363–364. *Rewis* v. *United States,* No. 5342, this Term, argued January 19, 1971, involves a question of the requisite factual relationship between a particular defendant and such use of interstate channels.

Similarly, it has long been recognized that Congress is authorized to punish conduct which is directed against the instrumentalities of, or persons or things involved in, interstate commerce. A legitimate exercise of its power in this area is reflected in federal legislation reaching such activities as theft from an interstate shipment (18 U.S.C. 659) or destruction of an aircraft or train travelling across state lines (18 U.S.C. 32, 1992). See, *e.g.*, *United States* v. *Gollin,* 176 F. 2d 889, 893 (C.A. 3), certiorari denied *sub nom. Richman* v. *United States,* 338 U.S. 848; *Friedman* v. *United States,* 233 Fed. 429, 430 (C.A. 1), certiorari denied, 244 U.S. 657.

Congress also has the power under the Commerce Clause, as augmented by the Necessary and Proper Clause (Art. I, § 8, cl. 18), to regulate any intrastate activity which "* * * exerts a substantial economic effect on interstate commerce * * *."

Wickard v. *Filburn*, 317 U.S. 111, 125. Cf. *The Shreveport Case*, 234 U.S. 342. It is conduct in this third category which is the subject of the instant legislation.

1. The perimeters of federal authority to control conduct affecting interstate or foreign commerce, which Congress invoked in enacting Title II of the Consumer Credit Protection Act, were first suggested by Chief Justice Marshall over a century ago in *Gibbons* v. *Ogden*, 9 Wheat. 1. Speaking for the Court (9 Wheat. at 195), he there stated:

> The genius and character of the whole government seem to be, that its action is to be applied to all those external concerns of the nation and *to those internal concerns which affect the States generally* * * * [emphasis supplied].

In marking the limits of federal action, he excluded only those local activities "which are completely within a particular State, which do not affect other States, and with which it is not necesary to interfere, for the purpose of executing some of the general powers of the government" (*ibid.*).

Although some subsequent decisions departed from this original principle,[4] the more restrictive view

[4] The chief departures were *United States* v. *E. C. Knight Co.*, 156 U.S. 1 (rejected in *Standard Oil Co.* v. *United States*, 221 U.S. 1, 68–69, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38–39); *Adair* v. *United States*, 208 U.S. 161 (substantially overruled in *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (disapproved in *United States* v. *Lowden*, 308 U.S. 225, 239); *First Employers' Liabil-*

enunciated in the earlier post-*Gibbons* cases was, as pointed out in *Wickard* v. *Filburn*, 317 U.S. 111, 121–122, largely the result of historical accident and ultimately gave way to Chief Justice Marshall's broad interpretation of the commerce power.[5] Thus, in *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119, Chief Justice Stone held for a unanimous court that "[t]he commerce power is not confined in its exercise to the regulation of commerce among the states," but, in addition, "extends to those activities intrastate which so affect interstate commerce, or the

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ity Cases, 207 U.S. 463 (disapproved in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 557); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (disapproved in *United States* v. *Darby*, 312 U.S. 100, and overruled in *Wickard* v. *Filburn*, 317 U.S. 111, 122, n. 21); *Hammer* v. *Dagenhart*, 247 U.S. 251 (overruled in *United States* v. *Darby*, 312 U.S. 100, 117).

[5] Because Congress made no substantial assertion of its commerce power until enactment of the Interstate Commerce Act in 1887, decisions of the Court immediately succeeding *Gibbons* dealt "almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce" and, as a result, "[i]n discussion and decision the point of reference, instead of being what was 'necessary and proper' to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood." *Wickard* v. *Filburn*, 317 U.S. at 121. When legislation began to be enacted "which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder," the Court at first "adhered to its earlier pronouncements, and allowed but little scope to the power of Congress." *Id.* at 121–122. Soon, however, the Court began to render other decisions which "called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall." *Id.* at 122. The trend instituted by these latter cases has never been reversed.

exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." And Mr. Justice Jackson, also speaking for a unanimous court, restated the principle in *Wickard* v. *Filburn*, 317 U.S. 111, 125, in words applicable to the present situation:

> * * * even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

See also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37; *United States* v. *Darby*, 312 U.S. 100; *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226–227.

Consequently, the groundwork had been well laid for the decision by this Court in *Katzenbach* v. *McClung*, 379 U.S. 294. There, owners of a local restaurant, which received a portion of its food from out of state, sought to enjoin the enforcement of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a) on the ground that Congress was without power under the Commerce Clause to enact a blanket prohibition against racial discrimination in public eating places without requiring case-by-case proof that discrimination in a particular restaurant affects interstate commerce. The *McClung* decision is instructive

for two reasons. First, the Court, in finding the necessary federal connection, was not content with a determination that a portion of the restaurant's food came from across state lines. It looked, instead, to the more meaningful economic impact on commerce generally among the several states of acts of racial discrimination confined within a particular state: to the inhibiting effect upon spending by Negroes, which in turn reduces the demand for interstate goods; to "wide unrest," which has "a depressant effect on general business conditions" in the communities where it occurs, and which causes "industry to be reluctant to establish" in such communities. 379 U.S. at 299–300. Second, the Court laid to rest any lingering notion that the failure of Congress to provide that "the Federal underpinning be proven in each prosecution" (Br. 6) renders the statute in question constitutionally vulnerable. Thus it stated (379 U.S. at 303):

> * * * Congress' action in framing this Act was not unprecedented. In *United States* v. *Darby*, 312 U.S. 100 (1941), this Court held constitutional the Fair Labor Standards Act of 1938. [Footnote omitted.] There Congress determined that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation. The appellees in that case argued, as do the appellees here, that the Act was invalid because it included no provision for an independent inquiry regarding the effect on commerce of substandard wages in a particular business. [Citations omitted.] But the Court rejected the argument, observing that:

> "[S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." At 120–121.

The *McClung* rationale was recently reaffirmed by this Court in *Maryland* v. *Wirtz*, 392 U.S. 183, in both of the above particulars. There, the constitutional challenge focused on an amendment broadening the coverage of the Fair Labor Standards Act to include all employees of an enterprise engaged in commerce or production for commerce, rather than only those employees who themselves were directly engaged in commerce or production for commerce. Again, because labor costs in any department affect the competitive position of a company doing interstate business ("competition" theory) and because substandard labor conditions in enterprises which purchase out-of-state goods tend to cause industrial strife which disrupts the interstate flow of goods ("labor dispute" theory), the Court found ample basis for federal intervention in the economic impact on interstate commerce, 392 U.S. at 190–192. Moreover, it went on to hold (392 U.S. at 192–193):

> Whether the "enterprise concept" is defended on the "competition" theory or on the "labor dispute" theory, it is true that labor

> conditions in businesses having only a few employees engaged in commerce or production may not affect commerce very much or very often. Appellants therefore contend that defining covered enterprises in terms of their employees is sometimes to permit "the tail to wag the dog." However, while Congress has in some instances left to the courts or to administrative agencies the task of determining whether commerce is affected in a particular instance, *Darby* itself recognized the power of Congress instead to declare that an entire class of activities affects commerce. [Footnote omitted.] The only question for the courts is then whether the class is "within the reach of the federal power." [Footnote omitted.] The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. [Citations omitted.]

2. These same two considerations are equally dispositive of the instant litigation. Plainly, the increasing interdependence of all parts of the economy and changes in commercial practices have, in fact, closely linked to interstate commerce many activities which were more isolated in earlier years. Today, virtually every activity, however local, which has a recognized economic effect exerts that effect in some way upon interstate as well as local commerce and, hence, is susceptible of federal control. As Mr. Justice Douglas, dissenting on another issue in *Maryland* v. *Wirtz,* 392 U.S. at 204, recognized: "Commercial activity of every stripe may in some way interfere 'with the [interstate] flow of merchandise' or interstate travel" and

therefore "may be regulated and controlled by Congress."* As pointed out in *North American Company* v. *Securities & Exchange Commission,* 327 U.S. 686, 705:

> This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States,* 196 U.S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

And see *American Power Co.* v. *Securities & Exchange Commission,* 329 U.S. 90, 103–104.

If racial unrest in *McClung,* and industrial strife in *Maryland,* threatened sufficient economic disruption to interstate commerce to sustain federal regulation of an entire class of activities, *a fortiori* organized crime which is "interstate and international in character," which is engaged in activities that "in-

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*Mr. Justice Douglas (joined by Mr. Justice Stewart), went on to state that in most situations such regulation is "entirely proper" (392 U.S. at 204), urging only that the line be drawn at applying federal regulations to employment conditions in state-owned enterprises, since in such cases "the regulated 'businesses' are * * * essential functions being carried on by the States" (*ibid.*).

volve many billions of dollars each year," and which is "directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens" (P.L. 90–321, 82 Stat. 146, 159, Sec. 201(a)(1)), has at least an equivalent disruptive effect on commerce;[7] legislation aimed at an entire class of transactions which generates a substantial part of the funds used to finance its insiduous activities is thus proper.[8] Certainly, loan sharking practices have no less adverse effect on interstate commerce, by diminishing the purchasing capacity of their victims and rendering them, through fear and resultant tension, less productive members of society, than the practice in *Filburn* of raising grain for self-con-

[7] Judge Hays, dissenting below (A. 35a), sought to distinguish *McClung* and *Maryland* on the ground that they did not involve an attempt by Congress "to regulate intrastate crime." However, as noted earlier, these cases did involve Congressional regulation of intrastate conduct. And it is quite clear from the many cases upholding federal criminal statutes enacted under the commerce power that the constitutional validity of federal regulation of conduct does not turn on whether the enforcement is by criminal or civil sanctions. See, *e.g.*, *United States* v. *Sullivan*, 332 U.S. 689, 697–698. To the contrary, this Court has specifically held that Congress, in exercising its commerce power, may adopt measures which "have the quality of police regulations" (*Hoke* v. *United States*, 227 U.S. 308, 323), and that it may exercise "the police power, for the benefit of the public, within the field of interstate commerce" (*Brooks* v. *United States*, 267 U.S. 432, 436–437). See also *Champion* v. *Ames*, 188 U.S. 321, 354–363.

[8] The statement by the House Managers, at the time P.L. 90–321 was reported out of the conference committee, reflects that the bill "is aimed directly at the activities of organized crime" (H. Conf. Rep. No. 1397, 90th Cong., 2d Sess., p. 28) and constitutes "a deliberate legislative attack on the economic foundations of organized crime" (*id.* at 31).

sumption (thereby diminishing the demand for grain sold interstate) and the practice in *McClung* of racial discrimination (thereby diminishing purchases by Negroes of interstate goods and possibly discouraging industrial relocation). The constitutionality of the instant legislation has thus been upheld by every court of appeals called upon to consider the question. *United States* v. *Biancofiori*, 422 F. 2d 584 (C.A. 7), certiorari denied, 398 U.S. 942; *United States* v. *Fiore*, 434 F. 2d 966 (C.A. 1), petition for certiorari pending, No. 1259, this Term. See also *United States* v. *DeStafano*, 429 F. 2d 344 (C.A. 2), petition for certiorari pending, No. 715, this Term; *United States* v. *Calegro DeLutro*, C.A. 2, No. 34987, decided December 11, 1970, petition for certiorari pending, No. 1234, this Term.

As already pointed out (*supra*, pp. 19–21), the fact that "the statute does not require the government to prove, as an element of the crime, that either the threat of violence or the credit extension at issue had any effect whatsoever upon or any relation to interstate commerce" (A. 33a) cannot be considered a constitutional infirmity. While it is true, as the court below noted (A. 18a), "that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense," the court was equally correct in observing that "this hardly resolves the question whether such a mode of drafting is *constitutionally* required" (A. 18a; emphasis in original). Here, as we shall show (*infra*,

pp. 28–32), Congress obviated case-by-case determination by finding that loan sharking as a practice exerts a deleterious effect upon commerce. Unquestionably, such an approach is constitutionally permissible. *Maryland* v. *Wirtz*, 392 U.S. 183, 192–193; *Katzenbach* v. *McClung*, 379 U.S. 294, 301–303; *Wickard* v. *Filburn*, 317 U.S. 111, 127–128; *United States* v. *Sullivan*, 332 U.S. 689, 697–698; *United States* v. *Darby*, 312 U.S. 100, 120–124.[9]

We point out that only recently Congress adopted the identical technique utilized in the present law of not requiring a showing of an effect on commerce in individual cases in enacting the Drug Abuse Control Amendments of 1965,[10] making it a crime to manufacture, process, sell or possess any depressant or stimulant drug.[11] The federal courts of appeals which

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[9] In fact, the effect of the loan sharking practices in this case was to cause Miranda to close his business (which no doubt sold merchandise that came from other states) and to curtail seriously his purchasing power as a consumer of interstate merchandise. See also pp. 30–31, n. 14, *infra*.

[10] P.L. 89–74, 79 Stat. 226, July 15, 1965, 21 U.S.C. (Supp. V) 331(q), 360a. The same approach has also been taken in two more recent statutes: The Organized Crime Control Act of 1970, P.L. 91–452, 84 Stat. 922, October 15, 1970, Titles VIII (see 18 U.S.C. 1511, 1955, IX (see 18 U.S.C. 1961–1968), XI (see 18 U.S.C. 841–848); The Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91–513, 84 Stat. 1236, October 27, 1970 (see 21 U.S.C. 841–851, 881–882). And cf. *United States* v. *Synnes*, C.A. 8, No. 20,238, decided February 1, 1971 (Sec. 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197).

[11] Admittedly, the reason invoked by Congress for doing so in this legislation—that as a practical matter it is very difficult or impossible to determine whether such drugs have moved

have considered the constitutionality of these provisions have uniformly sustained them against the claim, similar to that advanced by petitioner here, that they are beyond the power of Congress under the Commerce Clause. *White* v. *United States,* 395 F. 2d 5 (C.A. 1), certiorari denied, 393 U.S. 928; *White* v. *United States,* 399 F. 2d 813 (C.A. 8); *Deyo* v. *United States,* 396 F. 2d 595 (C.A. 9); *Whalen* v. *United States,* 398 F. 2d 286 (C.A.D.C.); *United States* v. *Cerrito,* 413 F. 2d 1270 (C.A. 7), certiorari denied, 396 U.S. 1004. And there, as here, Congress supported its use of this approach with appropriate formal findings. 79 Stat. 226–227. It is, then, to these formal findings that we now must turn.

B. *Congress had a "rational basis" for finding that loan sharking activities have a substantial economic effect on interstate commerce.*

In *Katzenbach* v. *McClung,* 379 U.S. 294, 303–304, this Court stated:

> * * * Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. * * *

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or been produced in interstate commerce—is different from the kinds of considerations which support the present statute (see *infra,* pp. 28–32). Our point here is only that there clearly is nothing inherently unconstitutional in the statutory technique which Congress in the instant case has chosen to use.

Similarly, here, the judicial function in assessing the constitutionality of the present statute under the Commerce Clause is only to determine whether Congress' conclusion—that extortionate credit transactions have a significant adverse effect on interstate commerce—has a reasonable factual basis. Thus, as in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, the only questions here are "(1) whether Congress had a rational basis for finding that [the proscribed activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Id.* at 258.

In light of *Filburn, McClung* and *Maryland,* it may well be that the inferences to be drawn from common experience are alone sufficient to furnish Congress with the requisite "rational basis" for the instant legislation. Surely, the observation of Mr. Justice Black in his separate opinion in *McClung* and *Atlanta Motel*—that despite the large body of evidence before Congress to justify its belief that racial discrimination has a "stifling and distorting effect" upon the sale of interstate goods, "this belief would not be irrational even had there not been" such evidence available (379 U.S. at 274)—applies with equal force to loan sharking activities of organized crime. It is not necessary, however, to rest the constitutional argument here on such inferences; Congress, when considering this legislation, had before it abundant specific information to justify enactment.

1. The Consumer Credit Protection Act, as it originally emerged from committee in both the House (H.R. 11601, 90th Cong., 1st Sess.) and the Senate (S. 5, 90th Cong., 1st Sess.) did not include what is now Title II of the Act (Extortionate Credit Transactions). Separate amendments to add provisions aimed at loan sharking activities were later proposed by Representatives Poff (Virginia) and McDade (Pennsylvania). 114 Cong. Rec. 1605–1606, 1609–1610. The two proposals differed in that the McDade amendment provided a blanket prohibition against extortionate credit transactions whereas the Poff amendment reached such transactions only if they could be shown either to affect commerce or involve the use of a facility of commerce. The Poff version was adopted in the House (114 Cong. Rec. 1610), but on the understanding that both proposals would be considered and a choice made between them during the Senate-House conference on the bill as a whole. As the bill emerged from conference, and was finally enacted, it essentially took the form of the McDade amendment. Title II of the Consumer Credit Protection Act, P.L. 90–321, 82 Stat. 159.

As Representative McDade emphasized on the floor of the House (114 Cong. Rec. 14391), the anti-loan-sharking bill that was ultimately adopted grew out of "profound study of organized crime, its ramifications and its implications," undertaken by some twenty-two congressmen in 1966–1967. The results of that study were embodied in a report entitled "The Urban Poor and Organized Crime," submitted to the House on August 29, 1967 (113 Cong. Rec. 24460–24464), which revealed that "organized crime takes over $350 mil-

lion a year from America's poor through loan-sharking alone." Indeed, as revealed in the report of the President's Commission on Law Enforcement and Administration of Justice,[11] on which the McDade study placed principal reliance, this activity "is the second largest source of revenue for organized crime" (p. 189), and is one of the methods by which the underworld obtains control of legitimate businesses (p. 190).

Perhaps the most graphic account of loan sharking practices that was undoubtedly considered by Congress, however, was the 1965 public report by the New York Commission of Investigations, prepared on the basis of extensive hearings on the subject.[12] That

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[11] *The Challenge of Crime in a Free Society*, A Report by the President's Commission on Law Enforcement and Administration of Justice (February 1967).

[12] *An Investigation of the Loan Shark Racket*, A Report by the New York State Commission of Investigation (April 1965). The background papers for the 1967 report of the President's Commission, which served as a major source for the McDade study, indicate that the New York State Commission's report was used extensively in preparing the later report. See *Task Force Report: Organized Crime* (1967), at 3, nn. 30, 33, 34, 38; *Task Force Report: Crime and Its Impact—An Assessment*, at 53, n. 117. Moreover, Representative Patman, leader of the House conferees who were instrumental in drafting the final version of the present statute (114 Cong. Rec. 14388), read into the record on January 30, 1968 (114 Cong. Rec. 1428–1431) a feature article on loan shark activities that had appeared in a recent *New York Times Magazine* and a separate news article on the same subject that had appeared in the *Times*. The feature article conveyed, in a more dramatic form, much of the information contained in the New York State Commission's report and drew upon that report as one of its sources. The other article related that, despite enactment of a state usury law as a result of the state commission's investigation, the menace of loan sharking had become even more serious. It is thus inconceivable that the

report reflects unequivocally that the loan shark racket is controlled by organized criminal syndicates, either directly or in partnership with independent operators to whom they furnish "prestige and brawn" (p. 12); that in most instances the racket is organized into three echelons, with the top underworld "bosses" providing the money to their principal "lieutenants", who in turn distribute the money to the "operators" who make the actual individual loans (pp. 10–11); that loan sharks serve as a source of funds to bookmakers, narcotics dealers, and other racketeers (pp. 13–16); that victims of the racket include all classes, from businessmen to laborers (pp. 33, 38–41, 77–79); that the victims are often coerced into the commission of criminal acts in order to repay their loans (pp. 41–45, 50–56); and that through loan sharking the organized underworld has obtained control of legitimate businesses (pp. 15, 19–31), including securities brokerages (pp. 57–67) and banks (pp. 68–76), which are then exploited and "milked dry" (pp. 31, 75–76).[14]

Conference Committee was unaware of the contents of this report at the time it considered the Poff and McDade amendments, or that this report failed to enter into their deliberations relating to these proposals.

[14] The several cases recently brought under the statute here in question are illustrative (*supra* p. 24). Thus, the victim here was the proprietor of his own butcher shop; in *DeStafano*, he was the proprietor of a gas station, whose son had incurred the debt; in *Fiore*, it was an insurance broker; in *Calegro DeLutro*, the victim was a furrier; and in *Biancofiori*, he apparently was a painter and decorator. Here, the victim was threatened with the "attention of persons higher in the money-lending chain" (A. 15a); in *Fiore*, the broker was told that the money belonged to the "big boss" (434 F. 2d at 968); in *Bian-*

Moreover, there were three days of open hearings on loan sharking held by the Senate Select Committee on Small Business the week before the conference bill was adopted by both houses. The testimony given at those hearings was made immediately available to members of the House. See, *e.g.*, 114 Cong. Rec. 14390. Witnesses—some of whom were New York law enforcement officials who had testified at the earlier state commission hearings—told essentially an updated version of the same story of menace and human misery that had been set forth in the state report of 1965. See *Impact of Crime on Small Business—1968*, Hearing before the Senate Select Committee on Small Business, 90th Cong. 2d Sess., May 14, 15 and 16, 1968 (hereafter referred to as "Hearings"). Significantly, one former New York police detective testified that federal agents working on cases involving such matters as revenue violations or interstate gambling frequently developed information on loan sharking which they were reluctant to refer to local authorities lest the investigations of the federal violations be prejudiced (Hearings, p. 7); however, such information rarely permitted a federal prosecution on the extortion aspect of

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cofiori, it was made clear that the lender "was an agent for a criminal organization" (422 F. 2d at 584). In addition, the victim here was told by petitioner that "his people" could have purchased the butcher shop at an auction sale and hired the victim to operate it (Tr. 118–124); in *Biancofiori*, the lender actually forced himself into a business partnership with the victim (422 F. 2d at 585). Finally, in the instant case, the victim was told to steal or sell drugs if necessary to obtain money to make the payments (Tr. 126–131); in *Fiore*, the victim was forced to misappropriate a client's check in order to meet his scheduled payments (434 F. 2d at 968).

the loan shark activity because the then applicable federal statutes required proof in each instance that a facility of commerce was used (Hearings, pp. 31–32).

It was on the strength of all this evidence that various members of Congress based their conclusions that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of the poor, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses. See generally, 114 Cong. Rec. 14391, 14392, 14395, 14396. The essence of these conclusions—which were summarized and embodied in formal findings (P.L. 90–321, 82 Stat. 146, 159, Sec. 201)[15]—is that loan sharking constitutes a substantial threat to the economic stability of the entire nation, a threat which only federal law enforcement authorities possess the capacity effectively to combat. This considered judgment of Congress is not, we submit, without reasonable factual basis.

2. *a.* The dissent below sought to discredit the formal findings primarily because it is "clear that not every extortionate act, no matter how small the debt involved, has any significant effect on interstate commerce" (A. 33a). However, this misconceives the basis on which Congress draws its authority "to declare that an entire class of activities affects commerce." See *Maryland* v. *Wirtz,* 392 U.S. 183, 192. The 239

[15] The original McDade amendment contained nine findings, and the original Poff amendment ten, which outlined in detail the impact of loan sharking upon the national economy. The findings set forth in the final version of the legislation shortened and summarized these more detailed earlier findings.

excess bushels of wheat harvested in *Filburn* (317 U.S. 111, 114, 127–128) similarly did not, by themselves, have "any significant effect" on the national price of wheat. And the racially discriminatory policy of the restaurant proprietor in *McClung* in and of itself neither "significantly" diminished Negro spending on interstate goods nor caused the "wide unrest" which the Court in that case found to have a depressant effect upon interstate commerce (379 U.S. 294, 300–301). But, as Mr. Justice Black stated in his joint concurring opinion in both *McClung* and *Atlanta Motel* (379 U.S. at 275), "we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow." And see the Court's opinion in *McClung,* 379 U.S. at 304–305; *Wickard* v. *Filburn,* 317 U.S. 111, 127–128.

Here, among other information, Congress had before it evidence that loan sharking takes $350 million a year from the poor alone. Surely, the transfer each year of that huge sum from the pockets of the poor to the pockets of those who prey upon them constitutes a "distortion" which burdens interstate commerce at least as much as racial discrimination "distorts" commerce by reducing Negro spending. Under these circumstances, the possible "*de minimis* character of individual instances" of loan sharking is, as this Court held in *Maryland* (392 U.S. at 197 n. 27), "of no consequence."

b. Nor can Congress' action reasonably be attacked on the ground that, "[a]lthough the Congressional findings refer to organized crime, there is no requirement in the statute that the prosecution establish any connection between organized crime and the transaction which is condemned" (A. 33a). This merely puts in issue the second aspect of the judicial review standard enunciated in *Atlanta Motel* (see *supra*, p. 27): whether Congress has chosen reasonable means to deal with the evil effects of interstate commerce it has properly found to exist.

As we have already indicated, Congress clearly had sufficient information before it to sustain the conclusion that, directly or indirectly, almost all loan sharking activities are controlled by organized crime, and that such activities are a major weapon in the assault by the organized underworld upon legitimate commerce (*supra*, pp. 29–30). The dissent below (A. 33a), for the sake of an occasional hypothetical loan shark who might have no connection with organized crime, would have Congress require proof in each case of "the relationship of the parties or their identity"—which presumably means proof either that the borrower obtained the money to finance an unlawful enterprise or that the lender was involved at some level in an organized criminal apparatus engaged in multi-faceted unlawful enterprises. To require such extraneous and difficult proof, however, would leave the statute as toothless as the state laws and the preexisting federal extortion laws, the practical ineffectiveness of which made the present legislation necessary. Such a self-defeating requirement, we submit, is not constitutionally compelled.

The degree to which the loan shark racket is controlled by the organized underworld, and the uses to which the underworld puts both the profits and the leverage that it reaps therefrom, plainly establish the existence of a serious deleterious effect on interstate commerce which it is necessary and appropriate for Congress to eliminate. Since effective elimination of the evil can be achieved only by subjecting all extortionate credit transactions to federal proscription, the means is "reasonable and appropriate"; it is not made the less so by the hypothetical possibility that some few loan sharks who are totally unconnected to the organized underworld will be caught in the federal net. And even the activities of an "independent" loan shark have significant impact on a borrower who is a businessman dealing in interstate merchandise, as well as the interstate activities of ordinary consumers.[16] As this Court declared over thirty years ago in *United States* v. *Darby*, 312 U.S. 100, 121:

> Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor

[16] While Congress did not include a formal finding precisely to this effect, its "absence is not fatal to the validity of the statute." *Katzenbach* v. *McClung*, 379 U.S. 294, 304. The constitutionality of the Act must be sustained if the courts can find a rational basis for the legislative prohibition "from all the considerations presented to Congress, and those of which [the courts] may take judicial notice." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154. See discussion infra, p. 38. Congress did find that "[e]ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." P.L. 90-321, sec. 201(a)(3).

> standards, it may chose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. * * * A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled.

c. Petitioner, however, attacks the statutory findings from a different angle. Invoking the "rational connection" test used in *Leary* v. *United States,* 395 U.S. 6, for determining the validity of a statutory presumption (Br. 7), he urges, with regard to the first finding, that "[a]t best, Congress has indicated that some extortionate credit transactions are a source of revenue to organized crime but flowing therefrom is not the rational connection between all extortionate credit transactions as a class and organized crime" (Br. 8). The fatal flaw in both the first and third findings, in his view, is that "Congress did not inquire into extortionate credit transactions per se or to the effect of such transactions on interstate and foreign commerce. The evidence before Congress was specifically directed towards the involvement of organized crime in this type of criminality" (Br. 8, 9).[17]

But such an argument confuses the "rational connection" concept necessary to sustain a legislative

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[17] In his petition for a writ of certiorari, petitioner suggested that the statutory findings would have possessed validity only if Congress had made a "statistical analysis of the legion of state loan-sharking prosecutions" and found that "at least a majority" possessed a "federal element" (Pet. 9–11).

presumption with the "rational basis" concept necessary to sustain a congressional assertion of power under the Commerce Clause to regulate a specific class of conduct. The two phrases—embodying, as they do, tests which serve separate functions—are not synonymous. A presumption—because it serves as a link in the evidentiary chain needed to establish that the conduct of a particular defendant falls within the legislatively proscribed class—must meet due process standards of probative reliability, lest the burden of proof be arbitrarily shifted to the defendant. See *Tot* v. *United States,* 319 U.S. 463, 467–469. And this is true even though the fact to be presumed is one which the legislature need not have made an element of the offense. 319 U.S. at 472. Thus, where the statutory presumption concerns a fact which, being outside common experience, necessitates specialized knowledge, Congress might be required to hold formal hearings and rely only on evidence meeting courtroom standards to sustain a finding of "rational connection."

A statutory assertion of power to regulate a certain class of conduct, on the other hand, involves wholly different considerations. Congress, in enacting the instant statute, did not create a legislative "presumption" that all defendants shown to have engaged in loan sharking activities will be deemed to have done so in interstate commerce—*e.g.,* in the sense of using a facility of commerce in connection with a particular transaction, engaging in a transaction which alone has a significant impact on commerce, and the like.

Rather, Congress has concluded that loan sharking activities as a class substantially affect commerce and hence are susceptible of federal control. The jury's function is simply to determine whether, in fact, "extortionate means" have been employed to collect or attempt to collect any extension of credit; no presumptions need be invoked to decide that question, which is the only question in determining the individual defendant's criminality.

It thus follows that the same high order of probative reliability necessary to sustain a legislative presumption is not required here. Rather, it is sufficient if a "rational basis" for Congress' exercise of its commerce power in this area can be found on "any state of facts either known or which could reasonably be assumed." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154. Nor is there any requirement that Congress acquire knowledge of those facts through formal hearings or any particular line of evidentiary inquiry. As this Court recently stated in *Maryland* v. *Wirtz,* 392 U.S. 183, 190, n. 18, "[w]e are not concerned with the manner in which Congress reached its factual conclusions." And see *Katzenbach* v. *McClung* 379 U.S. 294, 303–304; cf. *United States* v. *Synnes,* C.A. 8, No. 20,238, decided February 1, 1971. Manifestly, the various sources of information relating to the loan shark racket that were before Congress (*supra* pp. 28–32) offered more than adequate support for the findings on which it based its exercise of power under the Commerce Clause to enact the instant legislation.

II. TITLE II OF THE CONSUMER CREDIT PROTECTION ACT CAN ALSO BE SUSTAINED AS A PROPER EXERCISE OF CONGRESS' POWER UNDER THE BANKRUPTCY CLAUSE

Congress also had authority to enact the instant legislation on the basis of its power under the Constitution to establish "uniform Laws on the subject of Bankruptcies throughout the United States" (Art. I, § 8, cl. 4).[18] This is not to suggest that the statute is a bankruptcy law; Congress did not purport to make it such. Rather, Congress found that extortionate credit transactions "directly impair the effectiveness and frustrate the purposes of the laws" which have been enacted on the subject of bankruptcy. As stated in the Conference Report (H. Conf. Rep. No. 1397, 90th Cong., 2d Sess., p. 28):

> In the exercise of [its bankruptcy] power, Congress has enacted the Bankruptcy Act, which confers upon any debtor the statutory right, with certain qualifications, to be discharged of his debts by applying substantially all of his property toward their repayment. It is obvious, however, that obligations as to which there is an understanding that they may be collected by extortionate means, or which are actually so

[18] Although the majority below did not reach the question whether the Bankruptcy Clause provides a base for federal authority over loan sharking activities, other courts of appeals presented with the issue have held that it does. See *United States* v. *Biancofiori*, *supra*, 422 F. 2d at 586; *United States* v. *Fiore*, *supra*, 434 F. 2d at 970; see also *United States* v. *Calegro DeLutro*, 309 F. Supp. 462, 466 (S.D.N.Y.), affirmed, C.A. 2, No. 34987, decided December 11, 1970, petition for certiorari pending, No. 1234, this Term; *United States* v. *Curcio*, 310 F. Supp. 351, 356 (D. Conn.).

> collected, are not susceptible of being "discharged" in bankruptcy in any meaningful sense. Such transactions thus deprive the debtor of a Federal statutory right, and at the same time defeat one of the principal purposes of the Bankruptcy Act, which is to afford insolvent persons the opportunity to make a fresh start. Thus, it seems clearly within the power of Congress to protect the Federal statutory right, and to assure that the bankruptcy laws will be carried into execution, by enacting legislation to prohibit extortionate credit transactions. * * *

This reasoning, we submit is both logically and factually sound. As noted earlier (*supra*, pp. 29–30), much of the information before Congress concerning the operation of the loan shark racket detailed the methods by which the organized underworld used the leverage of its extortionate loans to take over the businesses of its victims. Those indebted to the underworld are, in a very tragic sense, deprived of any opportunity to make a fresh start. They cannot, as the facts of the instant case most graphically demonstrate, discharge their loan-shark debts simply by full repayment. Nor are they ever given an opportunity to satisfy other indebtedness by an equitable proration among creditors of available assets. In short, their plight is precisely as described on the floor of the House by Representative Poff in discussing the effect extortionate credit transactions have on the bankruptcy laws (114 Cong. Rec. 14391):

> The purpose of the bankruptcy clause is primarily humanitarian; namely, to give an insolvent debtor a fresh start by dividing his

> assets, remaining after essential family exemptions, among his creditors and discharging his liabilities to them. If a particular loan involves extortion and violates other criminal laws, it is not susceptible of being discharged. Indeed, its very existence probably will never come to light in the bankruptcy proceedings because the victim is in fear of his very life or the bodily safety of himself and his family. It is anomalous that all of the lawful obligations of the debtor can be discharged at the expense of honest creditors while an unlawful obligation survives the bankruptcy proceedings and remains alive for the benefit of the dishonest creditor. In summary, the loan-shark operation frustrates and defeats the function and purpose of the bankruptcy law with respect to which the Constitution gives the Congress exclusive jurisdiction.

It would appear self-evident that adherence on the part of creditors to the prescribed procedures under law for collection of their debts is an indispensable prerequisite to the effective functioning of any legal scheme aimed at the ordering of the affairs of insolvent persons. When there are creditors who refuse to follow these legal precepts, the meaningful implementation of the bankruptcy laws by all entitled to enjoy their benefits requires that the force of criminal sanctions be brought to bear against such creditors. On this basis, the instant legislation is "necessary and proper for carrying into Execution" (see Art. I, § 8, cl. 18) the bankruptcy power with which Congress is invested, and is "plainly adapted" to that end. Cf. *McCulloch* v. *Maryland*, 4 *Wheat.* 316, 409–420.

The dissent below objects that such reasoning "would lead logically to the conclusion that, under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts" (A. 32). This argument, however, misses the essential point. Congress has not exercised its bankruptcy power in this area because loan sharking has "some" effect on a "bankrupt's" debts. It has, instead, determined to reach this class of conduct because the loan shark racket has the total effect of forcing its victims into insolvency while, at the same time, depriving them of all access to the lawful relief afforded by the bankruptcy laws.

CONCLUSION

For the reasons stated, it is therefore respectfully submitted that the judgment appealed from should be affirmed.

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INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 600

ALCIDES PEREZ, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF

TITLE II OF THE CONSUMER CREDIT PROTECTION ACT IS AN UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER UNDER THE COMMERCE CLAUSE

A. Congress Does Not Have the Authority Under the Commerce Clause To Punish Extortionate Credit Transactions Without a Showing of a Federal Interest on a Case by Case Basis.

The Government's attempt to invoke the commerce clause to sustain Title II of the Consumer Credit Protection Act is similar to its attempt to invoke the same clause to sustain the anti-gambling statute challenged in *United States* v. *Denmark,* 346 U.S. 441 (1953).

In *United States* v. *Denmark, supra,* the Court considered a statute which prohibited the transportation of gambling devices in interstate commerce and re-

quired every manufacturer and dealer in gambling devices to register and file detailed information as to each device sold and delivered. Criminal penalties attached for failure to register or for violation of the proscription on transporting gambling devices. The Court divided into three positions. The prevailing opinion of the Court found the provision requiring the registration of local devices to present so serious a constitutional problem under the commerce clause that it concluded that the statute did not articulate with sufficient clarity its purpose to require registration of such local devices. The concurring opinion found the registration requirement too vague to be constitutionally valid. The dissent argued that Congress had in fact undertaken to require registration of local gambling devices, and that Congress could constitutionally do so to make effective the regulatory provisions applicable to interstate sales. But the dissent recognized that if Congress had undertaken to regulate local activity, rather than merely require registration, "its power would no doubt be less than clear." *United States* v. *Denmark,* 346 U.S. at 462.

Both the prevailing and the dissenting opinions lend support to the position we take here. The dissent suggests that the kind of proscription on local activity imposed by Title II of the Consumer Credit Protection Act is extremely questionable. The prevailing opinion takes the same view but with more emphasis on the departure from precedent. Justice Jackson, who authorized the prevailing opinion, stated (346 U.S. at 446-448):

> No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to

> be in, or mingled with, or found to affect commerce. * * * In some instances Congress has left to an administrative body, such as the Interstate Commerce Commission or the National Labor Relations Board, the power to decide on a case-to-case basis whether the particular intrastate activity affects interstate commerce so as to warrant exercise of the power to reach intrastate affairs. Decisions under this type of legislation give the Government no support, for no such determination is required by this Act, and the Government asserts no such finding by anyone is necessary. In other statutes Congress has set up economic regulations which lay hold of activities in interstate commerce but also include intrastate activities so intermingled therewith that separation is impractical or impossible. * * * While general statements, out of these different contexts, might bear upon the subject one way or another, it is apparent that the precise question tendered to us now is not settled by any prior decision.

See also *United States* v. *Bass,* 434 E. 2d 1296 (2nd Cir. 1970) in which the Court of Appeals for the Second Circuit discussed the commerce clause as applied to the federal firearms statute, 18 U.S.C. (Appendix) 1202(a) (Supp V 1970).

The Government counters by relying principally on this Court's decisions in *Katzenback* v. *McClung,* 379 U.S. 294 (1964) and *United States* v. *Darby,* 312 U.S. 100 (1941). But neither *McClung* nor *Darby* hold that the commerce clause vests Congress with the power necessary to sustain the statute challenged here. In *McClung,* the Court upheld Title II, section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a, as that

section applies to restaurants. But only restaurants which serve or offer to serve interstate travelers or in which a substantial portion of the food served has moved in commerce are reached by the Act. And the section of the Civil Rights Act of 1964 before the Court in *McClung* was a regulatory provision, and not criminal. Unlike Title II of the Consumer Credit Protection Act, the Civil Rights Act does not deprive the person affected of a jurisdictional defense in a criminal trial.[1] To be sure, the Court sustained section 201(a) of the Civil Rights Act because, among other things, it noted that the discrimination prohibited in the facilities covered was found by Congress—with ample evidentiary support—to impede interstate travel. See *Katzenback* v. *McClung, supra* at 299-301. But discrimination in restaurants which have operations affecting commerce is hardly analogous to purely local loan sharking activity completely unconnected with commerce. While such discrimination may be local in a geographic sense, the impact of such discrimination on commerce, whether taken in isolation or as a whole, is nationwide. Here, as we shall show, there is neither the evidentiary support available in *McClung* nor the link with commerce required by the

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[1] We think the difference between a regulatory statute and a criminal statute is significant under the circumstances discussed here. Title II of the Consumer Credit Protection Act, according to its legislative history, is aimed at the loan sharking activities of organized crime and consequently carries a possible penalty of twenty years incarceration and a $10,000 fine. By dispensing with the necessity of showing a federal interest and thus depriving a defendant of a jurisdictional defense, Title II brings within the reach of an extremely harsh sanction a broad mass of purely local activity which is unrelated to the alleged interstate evil Congress may constitutionally proscribe and which is certainly not serious enough to warrant the potential penalty provided.

Civil Rights Act to make rational the finding that the purely local activity reached by the Act affects commerce.

United States v. *Darby,* 312 U.S. 100 (1941) is similar to *McClung.* In *Darby* this Court upheld an indictment drawn under the provisions of the Fair Labor Standards of Act of 1938. Darby was charged with having employees engaged in the production of goods for commerce whose wage and hour conditions violated standards imposed by the Act, and with shipping in interstate commerce goods produced by such employees. He was also charged with violating the record keeping requirements of the Act. Thus, Darby's violation of provisions of the Act could be punished only if the Government could prove that the employees affected produced goods intended for shipment or actually shipped in interstate commerce.

Maryland v. *Wirtz,* 392 U.S. 183 (1968) does not strengthen the Government's position. The 1961 amendment to the Fair Labor Standands Act which this Court upheld in *Wirtz* only changed the basis of employee coverage under the Act. As the Court described the amendment, "instead of extending protection to employees individually connected to interstate commerce, the Act now covers all employees of any 'enterprise' engaged in commerce or production for commerce, provided the enterprise also falls within certain listed categories." [Footnote omitted] Id. at 186. The Court emphasized that the amendment did not change the class of employers affected but merely extended the Act to employees originally excepted. Id. at 193. By the Act's own terms, the employers regulated are engaged in commerce or production for commerce. Furthermore, the Court found a rational basis

for reaching all employees of covered employers, noting: "When a company does an interstate business, its competition with companies elsewhere is affected by all its significant labor costs, not merely by the wages and hours of those employees who have physical contact with the goods in question." Id. at 190. Alternatively, the Court observed that affording the protections of the Act to all employees of an enterprise engaged in commerce or production for commerce was a way of avoiding strife disrupting an enterprise involved in commerce and hence disrupting commerce. Id. at 192. In short, the Fair Labor Standards Act as amended in 1961 reaches only employers engaged in commerce or production for commerce and only those activities which could have an impact on commerce.

Title II of the Consumer Credit Protection Act is not limited to a class of persons, either by way of perpetrator or victim, connected in some way with commerce. Nor is the statute limited in its reach to only those activities which by some rationale has an impact on commerce. It reaches all extortionate credit transactions regardless of amount, relationship between the parties, the number of such transactions made, whether the lender is independent or in association with others, whether an interstate facility or instrumentality is used, or whether the transaction is aimed at an enterprise engaged in or whose operations affect commerce. In sum, it requires no showing by the Government of any federal interest and at the same time opens the federal courts to a broad mass of purely local incidents.

B. Congress Had No Information Before It Upon Which It Could Rationally Conclude That Purely Local Loan Sharking Activity Affects Interstate Commerce.

If the Federal Government has the power to proscribe purely local loan sharking activity through criminal sanctions without a showing on a case by case basis of any federal interest, it has such power only if local loan sharking activity "exerts a substantial economic effect on interstate commerce"[2] or "is so commingled with or related to interstate commerce that all [loan sharking] must be regulated if the interstate commerce is to be effectively controlled."[3] We think the Congressional exercise of power in Title II of the Consumer Credit Protection Act cannot be justified on either ground.

We turn first to the Government's argument that local loan sharking activity exerts a substantial economic effect on interstate commerce. The Government informs the Court that "Congress had before it evidence that loan sharking takes $350 million a year from the poor alone."[4] Because the sum is so large, the Government argues, the "*de minimis* character of individual instances * * * [is] of no consequence."[5] The Government's reasoning on this score seems unsound to us. To be sure, the Government is not limited to the one isolated instance in dispute before the Court in seeking to demonstrate the substantial economic effect on interstate commerce of the purely local activity sought to be proscribed; it may look to the impact

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[2] *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942).

[3] *United States* v. *Darby*, 312 U.S. 100, 121 (1941).

[4] Government's Brief at 33.

[5] Government's Brief at 33.

generated by all local activity caught within the statute's net. But it may not, as it has done here, rely on the estimated total proceeds derived from the proscribed activity and reason that *all* such activity has a substantial economic effect on interstate commerce. Indeed, it seems to us that this approach begs the question. This is especially true here for the Government informs that Court that the information before Congress supported "the conclusion that, directly or indirectly, almost all loan sharking activities are controlled by organized crime, and that such activities are a major weapon in the assault by the organized underworld upon legitimate commerce."[6] We take this to be a representation that not only are almost all loan sharking activities controlled by organized crime but, because organized crime is interstate in character,[7] almost all loan sharking activities are themselves interstate in character. If the Government's representation is accurate, purely local loan sharking activities are *de minimis* and hence, even taken as a whole, have no impact on interstate commerce.

The Government also argues that the diminished purchasing power of the victims of all loan sharking taken as a basis for federal intervention in the entire field.[8] Under the Government's

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[6] Government's Brief at 34. We do not concede the accuracy of the Government's representation but simply accept it solely for purposes of argument.

[7] See finding (1) of Title II of the Consumer Credit Protection Act.

[8] The Government states: "[T]he transfer each year of [$350 million] from the pockets of the poor to the pockets of those who prey upon them constitutes a 'distortion' which burdens interstate commerce * * *," Government's Brief at 33.

approach there are no limits to the types of purely local criminal activities within the reach of Congress. Certainly the losses generated by robberies, burglars, and other traditionally local crimes affecting property are significant enough, when considered as a whole, to lend support under the Government's approach to federal intervention.

The Government's approach overlooks the benefits derived from a federal state. Laws that proscribe criminal conduct reflect, both in terms of the activity proscribed and the sanction imposed, the attitude and views of the societal or governmental unit which makes the laws. As a result, a class of conduct which is proscribed in one state may not be proscribed in another; the penalty for the commission of a crime in one state may be vastly different in degree from that imposed in another. Thus, for example, loan sharking in the State of New York may be pervasive and serious enough to warrant a comprehensive penal provision carrying severe penalties. On the other hand, loan sharking in rural states, such as Iowa or North Dakota, may be infrequent, isolated, rarely connected with violence, and hardly worthy of the attention or possible penalties believed necessary for the problem in New York.

Alternatively, the Government argues that the statute's proscription on purely loan sharking is "reasonable and appropriate" because requiring proof in each case of a connection with organized crime or interstate commerce would be extremely difficult and would render the federal extortion statute ineffective.[9] First, we do not think the power of the Congress under the

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[9] Government's Brief at 34.

commerce clause can be expanded simply to accommodate the Government's desire to dispense in a criminal prosecution with what it considers a difficult element of proof. The Government's argument on this point is novel and hardly the equivalent of suggesting to the Court that purely local loan sharking activity is so commingled with or related to interstate commerce that it must be proscribed to control interstate commerce. See e.g. *Currin* v. *Wallace,* 306 U.S. 1, 9-11 (1939); *Southern Ry. Co.* v. *United States,* 222 U.S. 20 (1911).

Second, we do not think the Government lacks the ingenuity necessary to draft a criminal statute with a federal element easy to prove. See e.g. Representative Poff's amendment to the Consumer Credit Act (H.R. 11601, 90th Cong., 1st Sess.) which was adopted by the House but later rejected by the Senate House conferees and replaced with the version that was finally enacted. 114 Cong. Rec. 1605-1606.[10] And even if Representative Poff's amendment is viewed as placing a burdensome element of proof on the Government,

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[10] Sec. 102(a) of the Poff amendment contained congressional findings. The two operative sections, sections 102(b) and 102b(2) provided as follows (114 Cong. Rec. 1606):

> (b)(1) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by loan sharking or attempts so to do shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (2)(A) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of loan sharking and
>
> (B) thereafter performs or attempts to perform any act described in the preceding clause, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

there are other ways of accomplishing the same result. If, for example, the statute required the Government to prove that the extortionate transaction was directed against an enterprise whose operations affect interstate commerce, the Government could not be heard to complain about a burdensome element of proof. In fact, the Government suggests to the Court that the statute may be upheld on this ground, i.e. that "the activities of an 'independent' loan shark have significant impact on a borrower who is a businessman dealing in interstate merchandise, as well as the interstate activities of ordinary consumers".[11] But, again, the Government's suggestion offers no justification for reaching the purely local transaction which has no impact on interstate commerce and does not have to be proscribed to achieve the legitimate congressional objective.

Lastly, we turn to the Government's characterization of the evidence before the Congress. It is true that Representative Patman read into the record a feature article on loan sharking activities that had appeared in the *New York Times,* January 28, 1968, and that the article drew upon testimony before a New York State Commission of Investigation into loan sharking activities. But the article, for whatever it is worth, says nothing about the relationship between local extortionate credit transactions and the loan sharking activities of organized crime. 114 Cong. Rec. 1428-1431. As we noted in our brief,[12] the legislative history focuses principally on the relationship between organized crime and loan sharking. See Study of Organized

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[11] Government's Brief at 35.

[12] Petitioner's Brief at 8.

Crime and the Urban Poor introduced into the record by Representative McDade, 113 Cong. Rec. 24461. In fact, the paucity of legislative history which does appear on the subject indicates that there was no information available for Congress to make a judgment on the relationship between purely local transactions and interstate commerce.

The former Deputy Director of the President's Task Force Against Organized Crime, Professor Henry S. Ruth, Jr., testified before the Senate Select Committee on Small Business, 90th Congress, 2nd Sess., May 14, 15, and 16 (hereinafter cited Hearings) (Hearings at 20-21):

> "No one knows the full extent of loan sharking activities in the United States. Many law enforcement officials estimate that gross revenue from this source runs into the multibillion dollar range. Neither is there any way to allocate exact proportions to the amount of loan shark business that is part of, or affiliated with La Cosa Nostra. Certainly in the large cities of the New England, Middle Atlantic and Midwest States, law enforcement personnel believe that high percentage of this business is controlled by organized crime. In Philadelphia many of those who lend money at grossly usurious rates are not directly connected with the Cosa Nostra family operating in the city." [13]

When asked if he was acquainted with loan sharking activities beyond the large cities, and asked for an esti-

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[13] Professor Ruth testified that the only time a Cosa Nostra representative appears is when there is a dispute between debtor and creditor and then only for the purpose of arranging settlement terms.

mate of its prevalence, Professor Ruth replied (Hearings at 29):

> "I do not think I could really be honest and give an estimate of that sort, sir. When we get out of the large cities, I expect that there are people who are available, again in plants, and in the smaller communities, to lend money. But I would not know how they would connect themselves with organized crime."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PEREZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 600. Argued March 22, 1971—Decided April 26, 1971

Petitioner was convicted of "loan sharking" activities, *i. e.*, unlawfully using extortionate means in collecting and attempting to collect an extension of credit, in violation of Title II of the Consumer Credit Protection Act, and his conviction was affirmed on appeal. He challenges the constitutionality of the statute on the ground that Congress has no power to control the local activity of loan sharking. *Held:* Title II of the Consumer Credit Protection Act is within Congress' power under the Commerce Clause to control activities affecting interstate commerce and Congress' findings are adequate to support its conclusion that loan sharks who use extortionate means to collect payments on loans are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Pp. 3–11.

426 F. 2d 1073, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 600.—October Term, 1970

Alcides Perez, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 26, 1971]

Mr. Justice Douglas delivered the opinion of the Court.

The question in the case is whether Title II of the Consumer Credit Protection Act, 82 Stat. 159, 18 U. S. C. (Supp. V) § 891 *et seq.*, as construed and applied to petitioner, is a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution. Petitioner's conviction after trial by jury and his sentence were affirmed by the Court of Appeals, one judge dissenting. 426 F. 2d 1073. We granted the petition for a writ of certiorari because of the importance of the question presented. 400 U. S. 915. We affirm that judgment.

Petitioner is one of the species commonly known as "loan sharks" which Congress found are in large part under the control of "organized crime." [1] "Extortionate

[1] Section 201 of Title II contains the following findings by Congress:

"(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

"(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have

credit transactions" are defined as those characterized by the use or threat of the use of "violence or other criminal means" in enforcement.[2] There was ample evidence showing petitioner was a "loan shark" who used the threats of violence as a method of collection. He loaned money to one Miranda, owner of a new butcher shop, making a $1,000 advance to be repaid in installments of $105 per week for 14 weeks. After paying at this rate for six or eight weeks, petitioner increased the weekly payment to $130. In two months Miranda asked for an additional loan of $2,000 which was made, the agreement being that Miranda was to pay $205 a week. In a few weeks petitioner increased the weekly payment to $330. When Miranda objected, petitioner told him about a customer who refused to pay and ended up in a hospital. So Miranda paid. In a few months petitioner increased his demands to $500 weekly which Miranda paid, only to be advised that at the end of the week petitioner would need $1,000. Miranda made that payment by not pay-

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rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

"(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."

[2] Section 891 provides in part:

"(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

"(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

ing his suppliers; but, faced with a $1,000 payment the next week, he sold his butcher shop. Petitioner pursued Miranda, first making threats to Miranda's wife and then telling Miranda he could have him castrated. When Miranda did not make more payments, petitioner said he was turning over his collections to people who would not be nice but who would put him in the hospital if he did not pay. Negotiations went on, Miranda finally saying he could only pay $25 a week. Petitioner said that was not enough, that Miranda should steal or sell drugs if necessary to get the money to pay the loan, and that if he went to jail it would be better than going to a hospital with a broken back or legs. He added, "I could have sent you to the hospital, you and your family, any moment I want with my people."

Petitioner's arrest followed. Miranda, his wife, and an employee gave the evidence against petitioner who did not testify nor call any witnesses. Petitioner's attack was on the constitutionality of the Act, starting with a motion to dismiss the indictment.

The constitutional question is a substantial one.

Two "loan shark" amendments to the bill that became this Act were proposed in the House—one by Congressman Poff of Virginia, 114 Cong. Rec. pt. 2, pp. 1605–1606—and another one by Congressman McDade of New Jersey. *Id.*, 1609–1610.

The House debates include a long article from the New York Times Magazine for January 28, 1968, on the connection between the "loan shark" and organized crime. *Id.*, at 1428–1431. The gruesome and stirring episodes related have the following as a prelude:

> "The loan shark, then, is the indispensable 'money-mover' of the underworld. He takes 'black' money tainted by its derivation from the gambling or narcotics rackets and turns it 'white' by funneling it into channels of legitimate trade. In so doing, he

exacts usurious interest that doubles the black-white money in no time; and, by his special decrees, by his imposition of impossible penalties, he greases the way for the underworld takeover of entire businesses." *Id.*, at 1429.

There were objections on constitutional grounds. Congressman Eckhardt of Texas said:

"Should it become law, the amendment would take a long stride by the Federal Government toward occupying the field of general criminal law and toward exercising a general Federal police power; and it would permit prosecution in Federal as well as State courts of a typically State offense. . . .

"I believe that Alexander Hamilton, though a federalist, would be astonished that such a deep entrenchment on the rights of the States in performing their most fundamental function should come from the more conservative quarter of the House." 114 Cong. Rec. pt. 2, p. 1610.

Senator Proxmire presented to the Senate the Conference Report approving essentially the "loan shark" provision suggested by Congressman McDade, saying:

"Once again these provisions raised serious questions of Federal-State responsibilities. Nonetheless, because of the importance of the problem, the Senate conferees agreed to the House provision. Organized crime operates on a national scale. One of the principal sources of revenue of organized crime comes from loan sharking. If we are to win the battle against organized crime, we must strike at their source of revenue and give the Justice Department additional tools to deal with the problem. The problem simply cannot be solved by the States alone. We must bring into play the full resources of the Federal Government." 114 Cong. Rec. pt. 11, p. 14490.

The Commerce Clause reaches in the main three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as for example, the shipment of stolen goods (18 U. S. C. §§ 2312–2315) or of persons who have been kidnapped. 18 U. S. C. § 1201. Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft (18 U. S. C. § 32), or persons or things in commerce, as for example, thefts from interstate shipments. 18 U. S. C. § 659. Third, those activities affecting commerce. It is with this last category that we are here concerned.

Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, said:

> "The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

Decisions which followed departed from that view; but by the time of *United States* v. *Darby*, 312 U. S. 100, and *Wickard* v. *Filburn*, 317 U. S. 117, the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored. Chief Justice Stone wrote for a unanimous Court in 1942 that Congress could provide for the regulation of the price of intrastate milk, the sale of which, in competition with interstate milk, affects the price structure and federal regulation of the latter. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. The commerce power, he said, "extends to those activities

intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Id.*, at 119.

Wickard v. *Filburn*, 317 U. S. 111, soon followed in which a unanimous Court held that wheat grown wholly for home consumption was constitutionally within the scope of federal regulation of wheat production because, though never marketed interstate, it supplied the need of the grower which otherwise would be satisfied by his purchases in the open market.[3] We said:

> ". . . even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" 317 U. S., at 125.

As pointed out in *United States* v. *Darby*, 312 U. S. 100, the decision sustaining an Act of Congress which prohibited the employment of workers in the production of goods "for interstate commerce" at other than prescribed wages and hours—*a class of activities*—was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce. A unanimous Court said:

> ". . . Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an ad-

[3] That decision has been followed: *Beckman* v. *Mall*, 317 U. S. 597; *Bender* v. *Wickard*, 319 U. S. 731; *United States* v. *Haley*, 358 U. S. 644; *United States* v. *Ohio*, 385 U. S. 9.

ministrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the *class* last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." (Italics added.) *Id.*, 120–121.

That case is particularly relevant here because it involved a criminal prosecution, a unanimous Court holding that the Act was "sufficiently definite to meet constitutional demands." *Id.*, at 125. Petitioner is clearly *a member of the class* which engages in "extortionate credit transactions" as defined by Congress[4] and the description of that class has the required definiteness.

It was the "class of activities" test which we employed in *Atlanta Motel* v. *United States*, 379 U. S. 241, to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests. The Act declared that "'any inn, hotel, motel, or other establishments which provides lodging to transient guests' affects commerce *per se*." *Id.*, at 247. That exercise of power under the Commerce Clause was sustained.

". . . our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accom-

[4] See n. 2, *supra*.

> modations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight . . . and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook. . . ." 379 U. S. 252–253.

In a companion case, *Katzenbach* v. *McClung*, 379 U. S. 294, we ruled on the constitutionality of the restaurant provision of the same Civil Rights Act which regulated the restaurant "if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." *Id.*, at 298. Apart from the effect on the flow of food in commerce to restaurants, we spoke of the restrictive effect of the exclusion of Negroes from restaurants on interstate travel by Negroes.

> ". . . there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there." *Id.*, at 300.

In emphasis of our position that it was the *class of activities* regulated that was the measure, we acknowl-

edged that Congress appropriately considered the "total incidence" of the practice on commerce. *Id.*, at 301.

Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. *Maryland* v. *Wirtz*, 392 U. S. 183, 193.

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In an analogous situation, Mr. Justice Holmes, speaking for a unanimous Court, said ". . . when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Westfall* v. *United States*, 274 U. S. 256, 259. In that case an officer of a state bank which was a member of the Federal Reserve System issued a fraudulent certificate of deposit and paid it from the funds of the state bank. It was argued that there was no loss to the Reserve Bank. Mr. Justice Holmes replied, "But every fraud like the one before us weakens the member bank and therefore weakens the system." *Id.*, at 259. In the setting of the present case there is a tie-in between local loan sharks and interstate crime.

The findings by Congress are quite adequate on that ground. The McDade Amendment in the House, as already noted, was the one ultimately adopted. As stated by Congressman McDade it grew out of a "profound study of organized crime, its ramifications and its implications" undertaken by some 22 Congressmen in 1966–1967. 114 Cong. Rec. 14391. The results of that study were included in a report, The Urban Poor and Organized Crime, submitted to the House on August 29, 1967, which revealed that "organized crime takes over $350 million a year from America's poor through loan-sharking alone." See 113 Cong. Rec. 24460–24464. Congressman McDade also relied on The Chal-

lenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice (February 1967) which stated that loan sharking was "the second largest source of revenue for organized crime," *id.*, at 189, and is one way by which the underworld obtains control of legitimate businesses. *Id.*, at 190.

The Congress also knew about New York's Report, An Investigation of the Loan Shark Racket (1965). See 114 Cong. Rec. 1428–1431. That report shows the loan shark racket is controlled by organized criminal syndicates, either directly or in partnership with independent operators; that in most instances the racket is organized into three echelons, with the top underworld "bosses" providing the money to their principal "lieutenants," who in turn distribute the money to the "operators" who make the actual individual loans; that loan sharks serve as a source of funds to bookmakers, narcotics dealers, and other racketeers; that victims of the racket include all classes, rich and poor, businessmen and laborers; that the victims are often coerced into the commission of criminal acts in order to repay their loans; that through loan sharking the organized underworld has obtained control of legitimate businesses, including securities brokerages and banks which are then exploited; and that, "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." [5]

Shortly before the Conference bill was adopted by Congress a Senate Committee had held hearings on loan sharking and that testimony was made available to members of the House. See 114 Cong. Rec. 14390.

The essence of all these reports and hearings was summarized and embodied in formal congressional find-

[5] See n. 1, *supra*.

ings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses. See generally 114 Cong. Rec. 14391, 14392, 14395, 14396.

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 600.—October Term, 1970

Alcides Perez, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 26, 1971]

Mr. Justice Stewart, dissenting.

Congress surely has power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those intrastate activities which have a demonstrably substantial effect on interstate commerce. But under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the national Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes which distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a dis-

tinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.